34172-7-II

No. 78148-6

SUPREME COURT
OF THE STATE OF WASHINGTON

THURSTON COUNTY,
Petitioner

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD and 1000 FRIENDS OF WASHINGTON,
Respondents,

And

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, OLYMPIA MASTER BUILDERS, and PEOPLE FOR RESPONSIBLE ENVIRONMENTAL POLICIES,
Petitioner-Intervenors

THURSTON COUNTY'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

PAGE

A. ASSIGNMENTS OF ERROR 1

1. The Western Washington Growth Management Hearings Board ("Board") erred in entering its Final Decision And Order dated July 20, 2005, its Order On Motion For Reconsideration dated August 11, 2005, and its Order on Motion To Dismiss of April 21, 2005 (Appendices A, B & C) which failed to dismiss the Petition For Review of 1000 Friends of Washington ("1000 Friends") for lack of standing. 1
2. The Board erred in failing to dismiss the Petition regarding the Urban Growth Areas ("UGAs") of Thurston County ("County") for lack of subject matter jurisdiction, as time barred, and because Thurston County is in compliance with RCW 36.70A.110 and 130. 1
3. The Board erred in failing to rule, in the aforementioned orders, that the County's UGA was GMA-compliant because it was unchanged from the UGA designation that was previously upheld by the Board in *Reading, et al., v. Thurston County, et al.*, WWGMHB 94-2-0019 (1995), or never challenged. 1
4. The Board erred in failing to dismiss 1000 Friends' challenge to the Thurston County Comprehensive Plan, Natural Resource Lands Chapter (Chapter 3), because 1000 Friends failed to timely appeal the review and update of Chapter 3 which was adopted by Thurston County Resolution No. 13039 on November 19, 2003 2
5. The Board erred in finding Thurston County's designation criteria for agricultural lands of long term commercial significance are noncompliant with the GMA. 2
6. The Board erred in entering its July 20, 2005 Final Decision and Order and August 11, 2005 Order on Motion for Reconsideration by finding that Thurston County failed to provide for a variety of rural densities as required under RCW 36.70A.070(5)(b). 2

Issues Pertaining To Assignment Of Errors 2
1. Does a Seattle based entity, 1000 Friends, that has not shown that any of its members have any concrete, tangible interests, which would be injured-in-fact by the 2003 and 2004 Thurston County Plan updates, have standing to bring a petition to the Board challenging the Plan updates and to defend the Board's orders on that petition in this Court? (Assignment of Error 1.) 2
2. Did the Board have authority to order the reduction in the overall size of the County's UGAs where: (a) except for minor changes in the UGAs for Tenino and Bucoda, the UGAs remained as they were established ten years earlier, (b) all appeal periods relating to the previously established UGA boundaries have expired and these UGA boundaries have been upheld by the Board in a previous appeal; (c) property owners' reasonable expectations for the potential development of their lands have been based on the decade-long UGA designations and zoning based on these designations; (d) pursuant to the longstanding UGA designations and corresponding zoning, considerable development has occurred throughout the UGAs; and (e) where the projected rate of growth presently is higher than it was when the UGA designations were made a decade ago and is predicted to continue? (Assignment of Error 2.) 3
3. In determining whether the County's UGAs are too large, did the Board have authority to impose a bright line rule of a maximum "25% market factor" and to rule that the County is out of compliance with the GMA if a higher market factor was utilized? (Assignment of Error 2.) 3
4. Is a "rapidly growing" county compliant with the GMA's UGA designation requirements (RCW 36.70A.110 and .115) if it meets all requirements for GMA's mandatory 10-year review (RCW 36.70A.130(3)) and reasonably determines that the UGAs designated a decade ago, with two minor changes, continue to be sufficient to accommodate the population growth projected to occur in the county for the succeeding twenty-year period? (Assignment of Error 2.) 4
5. Did the Board have authority to rule that UGA designations were too large and noncompliant with the GMA to the

extent that they are the same, with two minor modifications, as those that were established ten years earlier and a challenge to a part of the UGA designation was rejected by the Board in *Reading, et al., v. Thurston County, et al.*, WWGMHB 94-2-0019 (1995)
(Assignment of Error 3.) 4

6. Did the Board have jurisdiction to review the Natural Resource Lands provisions of the Comprehensive Plan, when, as part of the seven year review and as expressly authorized and encouraged by RCW 36.70A.130(5)(a), Thurston County elected to begin its review earlier than required with the Natural Resource Lands Chapter (Chapter 3) of its Comprehensive Plan and complete this phase of its review with the adoption of Resolution 13039 on November 19, 2003 and no petition appealing these provisions was filed within 60 days of publication as required by RCW 36.70A.290(2)?
(Assignment of Error 4.) 5
7. If the Board had jurisdiction to review preexisting agricultural resource lands designation criteria, were the minimum parcel size and actual use criteria adopted within the County's discretion?
(Assignment of Error 5.) 5
8. Did the Board have jurisdiction to decide whether the County is compliant with RCW 36.70A.070(5)(b) by providing for a variety of rural densities where the challenged County provisions for rural densities were adopted a decade ago and were not changed as a result of the 2004 review and revisions?
(Assignment of Error 6.) 5
9. If the Board has jurisdiction to decide whether preexisting County provisions are compliant with RCW 36.70A.070(5)(b), has the County achieved compliance, within the range of its discretion to make policy on the basis of local circumstances, by adopting development regulations that provide for a variety of rural densities through clustering, density transfer, conservation easements and design guidelines, and that recognize the important reality of large tracts of natural resource lands interspersed with and surrounding the rural areas ?
(Assignment of Error 6.) 5

II. STATEMENT OF THE CASE 6
A. The 2003 And 2004 Review And Update Of The Thurston County Comprehensive Plan Required Under RCW 36.70A.130(4)&(5). 6
B. The History Of Thurston County's Comprehensive Plan, Population Growth, And The Sizing Of The UGAs. 10
C. Thurston County's Comprehensive Plan Update Regarding Provisions For A Variety Of Rural Densities 15
D. Procedural History 19
D. Procedural History 19

III. ARGUMENT 20
A. Summary of Argument 20
B. Standard of Review 25
C. Standing: 1000 Friends As A Seattle Corporation With No Interest Or Injury In Thurston County Did Not Have Standing To Bring The Petition Before The Growth Management Hearings Board In This Matter 30
D. The Board Based Its Review And Decision On The Erroneous Legal Assumption That The Periodic Local Reviews Required By RCW 36.70A.130 Make Every Provision Of The Reviewed Comprehensive Plan And Development Regulations Subject To Board Review Even If They Were Not Changed In Any Way 35
E Subject Matter Jurisdiction: The Board Did Not Have Subject Matter Jurisdiction Over The County's Criteria And Designation Of Agricultural Lands Of Long Term Commercial Significance Because That Part Of The Comprehensive Plan Was Adopted In November 2003 And No Appeal Occurred Within Sixty Days Of Publication Of The Resolution 36
F. The Board Did Not Have Authority To Rule that Urban Growth Areas Established In 1994 Were Too Large 43
G. The Board Misapplied And Misconstrued RCW 36.70A.110 In Concluding The County's UGAs Are Too Large 45
H. Thurston County's Comprehensive Plan And Development Regulations Provide For A Variety Of Rural Densities 47

IV. CONCLUSION 52

TABLE OF AUTHORITIES

PAGE

Cases

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261 (1977) 31
Biggers v. City of Bainbridge Island, 124 Wn. App. 858, 103 P.3d 244 (2004) 32
Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994) 33
Chelan County v. Nykreim, 146 Wn.2d 904, 53 P.3d 1 (2002) 32
County Alliance v. Snohomish County, 76 Wn. App. 44, 882 P.2d 807 (1994) 32
Leavitt v. Jefferson County, 74 Wn. App. 668, 875 P.2d 681 (1994) 32
Mountlake Community Club v. Hearings BD., 110 Wn. App. 731, 43 P.3d 57 (2002) 44
Project for Informed Citizens v. Columbia County, 92 Wn. App. 290, 966 P.2d 338 (1998) 34
Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 110 P.3d 1132 (2005) 22, 27, 28, 29, 46, 49
Redmond v. Growth Hearings Board, 136 Wn.2d 38, 959 P.2d 1091 (1998) 42, 43
SAVE v. Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978) 31, 34
Skamania County v. Columbia River Gorge Comm'n, 144 Wn.2d 30, 26 P.3d 241(2001) 35
State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996) 33
Trepanier v. Everett, 64 Wn. App. 380, 824 P.2d 527 (1992) 31
Viking Properties v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005) 46
Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) 31
WEAN v. Island County, 122 Wn. App. 156, 93 P.3d 885 (2004) 52
Wells v. Western Washington Growth Management Hearings Board, 100 Wn. App. 657, 997 P.2d 405 (2000) 32
Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000) 35

Growth Management Hearings Boards Decisions

Hapsmith v. City of Auburn, CPSGMHB, 95-3-0075 (1996) 31
Orton Farms, LLC, et al., v. Pierce County, CPSGMHB No. 04-3-0007c, Final Decision And Order (August 2, 2004), p.26 42
Reading v. Thurston County, WWGMHB 94-2-0019 (Final Decision And Order 3/23/95) 12, 43, 44

Statutes

ch. 36.70A RCW 6
Law of 1995, ch. 400, § 2 24
Laws of 1997, ch. 429, § 20(3) 28
RCW 34.05.425 26
RCW 34.05.530 30
RCW 34.05.570(3) 25
RCW 34.05.570(3)(b) 27, 30
RCW 34.05.570(3)(d) 27, 30
RCW 34.05.570(3)(e) 30
RCW 34.05.570(3)(i) 30
RCW 34.12.050 26
RCW 36.70A.011 ..... 22, 29
RCW 36.70A.020 ..... 39, 48
RCW 36.70A.030(2) 24, 42
RCW 36.70A.030(15) 49
RCW 36.70A.040 ..... 6, 40
RCW 36.70A.060 19
RCW 36.70A.070(2) 19
RCW 36.70A.070(5)(a) 47, 48
RCW 36.70A.070(5)(b) 19, 25, 47, 48, 49
RCW 36.70A.110 ..... 19, 24, 45
RCW 36.70A.110(2) 12, 22, 24, 44, 45
RCW 36.70A.110(5) 29
RCW 36.70A.115 ..... 13, 24, 46
RCW 36.70A.130 ..... 6, 23, 35, 36, 40
RCW 36.70A.130(1) 38, 39
RCW 36.70A.130(1)(a) 6, 38
RCW 36.70A.130(1)(b) 40, 41
RCW 36.70A.130(4) 6, 7, 36, 37
RCW 36.70A.130(4)(a) 6, 38
RCW 36.70A.130(5)(a) 6, 7, 36
RCW 36.70A.170 19
RCW 36.70A.170(1)(a) 24

RCW 36.70A.177 49
RCW 36.70A.215 13
RCW 36.70A.280(2) 21, 30, 33
RCW 36.70A.290(2) 35, 38, 41
RCW 36.70A.295 34
RCW 36.70A.320 ..... 22, 28
RCW 36.70A.320(1) 27
RCW 36.70A.320(2) 27
RCW 36.70A.320(3) 28
RCW 36.70A.3201 ..... 22, 28, 29, 45

Washington Administrative Code

WAC 365-190-050(1)(e) 42

Other Authorities

ch. 20.08A TCC 17
ch. 20.08C TCC 18
ch. 20.08D TCC 18
ch. 20.09 TCC 18
ch. 20.09A TCC 18
TCC 20.62.020 16
Richard L. Settle, *Washington's Growth Management Revolution Goes to Court,* 23 SEATTLE U. L. REV. 5, 49 (1999) 27

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[1] Thurston County had originally included Limited Areas of More Intensive Rural Development (LAMIRDs) in its Petition For Discretionary Review, but is now abandoning that issue regarding the substantive questions. However, if this Court determines that 1000 Friends lacks standing or that the Board lacked jurisdiction to require revision of comprehensive plan provisions that have been in effect for years and were not amended in 2004, Thurston County would ask this Court to reverse the Board's decision on all issues included in the Board's Final decision which includes LAMIRDs.

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II. STATEMENT OF THE CASE

A. The 2003 And 2004 Review And Update Of The Thurston County Comprehensive Plan Required Under RCW 36.70A.130(4)&(5).

Thurston County is subject to the requirements of the Growth Management Act, ch. 36.70A RCW, (GMA) to adopt a comprehensive plan and development regulations in compliance with the GMA. RCW 36.70A.040. In 1997, the Legislature amended RCW 36.70A.130 to require that each county and city subject to GMA planning requirements "review and, if needed, revise" its comprehensive plan and development regulations "on or before" specified dates and every seven years thereafter. RCW 36.70A.130(1)(a) and (4). *See* Appendix D.

Petitioner Thurston County was in the group of counties required to conduct the prescribed review by the earliest of the specified dates, "[o]n or before December 1, 2004..." RCW 36.70A.130(4)(a). In addition to the "on or before" qualifier of the specified deadlines, the Legislature went on to repeat its authorization of, and recognized potential incentives for, early review by providing that "[n]othing in this section precludes a county or city from conducting the review and evaluation required by this section before the time limits established..." and that "[c]ounties and cities may begin the process early and may be eligible for grants...if they elect to do so." RCW 36.70A.130(5)(a).

Thurston County chose to begin the review process early, in accordance with RCW 36.70A.130(4) and (5)(a), and to conduct its review in three phases. The first phase, commenced in 2002, was review of the Natural Resource Lands Chapter (Chapter 3) and the Natural Environment Chapter (Chapter 9) of the Thurston County Comprehensive Plan.[2]). AR 1829.

From the beginning, Thurston County made it clear that the natural resource lands review was part of the comprehensive review required under RCW 36.70A.130(4). AR 1829, AR 1792, AR 1796, AR 1798, AR 1820. In fact, Thurston County received a grant from the Washington State Department of Community Trade and Economic Development ("CTED") as an incentive, under RCW 36.70A.130(5)(a), for beginning the process early. AR 1792, AR 1829, AR 1806. The review process included extensive public outreach, AR 1806, including a public hearing on the agricultural lands update before the County Planning Commission on November 20, 2002. AR 1819. The State Office of Community Development reviewed and made comments on the proposed comprehensive plan amendment to Chapter 3. AR 1827-1828. The update was presented to the Board of County Commissioners in December 2002. AR 1829-1841. On August 12, 2003, Jennifer Hayes, Associate

[2] Chapter 9, Natural Environment, of the Thurston County Comprehensive Plan is not part of the appeal and, therefore, will not be included in the discussion herein.

Planner with Thurston County, specifically sent the proposed update of the Natural Resource Lands Chapter (Chapter 3) to Respondent 1000 Friends. AR 1844.

Following the approximately 2-year review process, the Thurston County Board of County Commissioners adopted Resolution 13039 on November 10, 2003 which included the amendments to the Natural Resource Lands Chapter (Chapter 3), of the Comprehensive Plan. AR 1845. On November 19, 2003, Thurston County published a notice in the Olympian newspaper that Resolution 13039 had been adopted by the County. AR 2613. The Petition For Review by 1000 Friends was not filed until January 21, 2005, over 14 months later. AR 1.

After Thurston County adopted the update to the Natural Resource Lands Chapter (Chapter 3) of the Thurston County Comprehensive Plan (Phase 1), the County proceeded to Phase 2: review and update the remaining chapters of the Thurston County Comprehensive Plan, excluding updates involving Critical Areas which would be done in Phase 3. AR 7.[3]

During 2004, the Planning Commission held several public meetings and hearings on Phase 2 of the Comprehensive Plan update. AR 644-654. Among the various items on the 2004 official docket of

[3] The Critical Areas update (Phase 3) is not completed and is not a part of this appeal.

Comprehensive Plan amendment proposals were 1) an update and supplement to the Rainier/Thurston County joint plan in compliance with the GMA; 2) amendment of the Tumwater/Thurston County joint plan in compliance with the GMA; 3) amendment of the Tenino/Thurston County joint plan with the possible alteration of the UGA in compliance with the GMA; 4) the establishment of an UGA for the City of Bucoda in compliance with the GMA; and 5) amendment of the Comprehensive plan following review of all chapters besides Chapters 3 and 9 which had been reviewed and updated in 2003. AR 670-671.

During the Summer of 2004, the Comprehensive Plan was reviewed by the Planning Commission and submitted to CTED for its review. AR 672-678. On September 29, 2004, the Planning Commission held a public hearing on the update of the rest of the Comprehensive Plan under Phase 2. AR 678. The only person testifying for Respondent 1000 Friends was Tim Trohimovich who gave a Seattle, Washington address in his oral and written remarks. AR 681 and 687. Following a subsequent public hearing before the Board of County Commissioners, Phase 2 of the Comprehensive Plan update was adopted on November 22, 2004 by passage of Resolution No. 13234 and Ordinance No. 13235. AR 688-718.

B. The History Of Thurston County's Comprehensive Plan, Population Growth, And The Sizing Of The UGAs.

Thurston County's initial Comprehensive Plan ("Plan") was adopted in 1975 and first overhauled in 1988. AR 752. Following the legislature's adoption of the GMA in 1990, Thurston County again updated its Plan to bring it into compliance with new GMA requirements. AR 752. Rather than reviewing its Plan only once every seven years, as now required by RCW 36.70A.130, the County has reviewed and, if needed, amended, its Plan on an annual basis, AR 754, to keep pace with the changing conditions and needs of a growing county. AR 754.

Thurston County has been among the state's fastest growing counties since the 1960s. AR 755. The County experienced a population increase of over 40% in the 1960s, 61% in the 1970s, 30% in the 1980s and 29% in the 1990s. AR 2084. Thurston County added over 46,000 residents between 1990 and 2000, with the majority of growth occurring in the UGAs. AR 755. In 2003, the County's population was approximately 214,800 and projections show over 330,000 living in the County in 2025, an increase of 35% over the twenty year period. AR 755.

In 1983, Thurston County, along with the cities of Olympia, Lacey and Tumwater blazed the trail for growth management in Washington State by signing an interlocal agreement called the Urban Growth

Management Agreement. AR 760. That early Agreement included an urban growth management boundary around the three cities to limit their expansion for 20 years. AR 760. One of the main purposes and effects of the urban boundary was to limit the extension of urban utilities, especially sewer service. AR 760. To that end, overall urban residential density was to be high enough to support urban public services and to provide affordable housing choices with most densities ranging from 4 to 16 dwelling units per acre. AR 760.

Following the initial agreement between the cities and the County, the municipalities continued to work together. In June of 1988, the County and the Cities of Lacey, Olympia and Tumwater entered into the "Memorandum of Understanding: An Urban Growth Management Agreement." AR 1660-1674. After the 1990 enactment of the GMA, Thurston County adopted Resolution No. 10452 in 1993 initiating GMA compliant interim UGAs for the cities of Lacey, Olympia and Tumwater. AR 1675-1679. In 1994, Thurston County adopted Resolution No. 10683 which established a final UGA for the City of Olympia consistent with the GMA. This UGA was upheld by the Board in *Reading, et al., v Thurston County,* WWGMHB 94-2-0019 (Final Decision And Order 3/23/95)[4]. In

[4] "Where a unique three-city configuration coupled with excellent anti-sprawl goals, policies, and strategies are present in a comprehensive plan, the UGA boundary complied with the GMA even though from a strict numerical formula it was overly

1994, the Thurston County Board of County Commissioners also adopted final UGAs for the cities of Tenino, Tumwater, Lacey and Yelm, and these UGAs were never challenged.[5]

The County adopted countywide planning policies ("CPPs"), in accordance with RCW 36.70A.210, on September 8, 1992 providing that each city and town was to assume lead responsibility for preparing the joint plan for its growth area in consultation with the County and any adjoining jurisdictions. AR 1040. Furthermore, the CPPs that were agreed upon by the cities and the County required involvement by all municipalities in any County amendment of UGA boundaries.

The GMA requires that the size of UGAs and density of development allowed within them be sufficient to accommodate the urban development necessary to house and serve the population increase projected by the Washington State Office of Financial Management ("OFM") for the succeeding twenty-year period. AR 765. RCW 36.70A.110(2). In 2003, the Legislature adopted a new GMA provision emphasizing that local plans and development regulations must "provide sufficient capacity of land suitable for development...to accommodate their allocated housing and employment growth" in accordance with CPPs

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large." *Reading v. Thurston County,* WWGMHB 94-2-0019 (Final Decision And Order 3/23/95), page 231 of the WWGMHB January 2005 digest update. *See* Appendix E.

[5] Resolution Nos. 10702, 10895, 10786 and 10851. AR 1684-1738.

and OFM population forecasts. RCW 36.70A.115.

The CPPs direct the Thurston County Regional Planning Council ("TRPC") to develop small area population projections based on the framework of the countywide population projection provided by OFM. AR 765. The TRPC computer model includes analysis of employment trends and assumptions of population change. AR 765. The population distributions are designed to ensure that each city's and town's comprehensive plan and any applicable joint plan with the county accommodates the allocated population growth. AR 765.

To ensure that there will be an adequate amount of land suitable for development in the UGAs, as required by RCW 36.70A.115, and in compliance with the review and evaluation program required by RCW 36.70A.215, the County has established a buildable lands program requiring jurisdictions to track their ability to accommodate population growth. AR 766. TRPC is the County's lead agency for the buildable lands program. AR 766. TRPC's 2003 buildable lands report found that a sufficient residential land supply exists to accommodate 25 years of projected population growth in all jurisdictions within Thurston County. AR 766. This determination was reflected in the November 22, 2004 Resolution No. 13234 that adopted Phase 2 of the seven-year update. AR 689.

As part of the 2004 seven-year update process, several Cities updated their joint City-County plans. The City of Rainier updated its Comprehensive Plan and Joint Comprehensive Plan with Thurston County on November 9, 2004. AR 912. The Plan shows that Rainier's population increased 50.6% from 1990 to 2000 and that the projected amount of land remaining in the year 2025 under the buildable lands report is sufficient. AR 931 and 942.

The 2004 amendments to the Tumwater/Thurston County Joint Plan show that the Tumwater UGA will have a population increase of 14,638 or a 72% increase from 2002 to 2022. The Plan shows that there is enough buildable land to accommodate the projected population of the Tumwater UGA for the next 20 years. AR 1116.

The City of Tenino Comprehensive Plan and Joint Plan with Thurston County was updated in November 2004. AR 1360. A population estimate of 1,967 by 2026 for the Tenino UGA was used for planning purposes. AR 1397. Since the adoption of the 1994 Comprehensive Plan, a large tract of undeveloped land within Tenino's UGA was included in a conservation and family trust which allowed only non-urban uses. AR 1407. Consequently, Tenino's planning commission removed this 295 acre area from the UGA and, in exchange, added 265 acres on the west side of the UGA. AR 1407. The City of Tenino's UGA

was actually reduced in size as a net result of this exchange whereby 295 acres were removed and only 265 acres were added. AR 1777-1781. After this UGA adjustment, it was determined that the City of Tenino had a sufficient supply of developable land to accommodate projected growth over the 20 year planning period. AR 1405-1406.

The Town of Bucoda Comprehensive Plan and Joint Plan with Thurston County were adopted in November 2004. AR 688. The new UGA designation, comprised of 255 acres, provided an alternative location for development which previously was limited to building on small previously platted lots directly above a sole source aquifer, with attendant risk of drinking water contamination. AR 1767-1773, 1788. The plan shows that there is now a sufficient supply of land suitable for development to accommodate projected growth in the UGA over the 20 year planning period. AR 1510 and 1527-1528.

C. Thurston County's Comprehensive Plan Update Regarding Provisions For A Variety Of Rural Densities.

Phase 2 of the 2004 Comprehensive Plan update included rural area designations for resource use lands which encompassed 156,775 acres or 39.3% of the land area of Thurston County. AR 774. Resource use lands have maximum densities that are much lower than 1 unit per 5 acres, including 1 unit per 20 acres, 1 unit per 40 acres, and 1 unit per 80 acres.

AR 775-777. The rural resource and residential designation with maximum density of 1 unit per 5 acres includes 192,708 total acres or 48.3% of the County's land area. AR 775. Therefore, about 88% of rural Thurston County is designated for resource and low density rural residential uses, with densities ranging from 1 unit per 5 acres to 1 unit per 80 acres. AR 774-775. Moreover, the County provides for clustering, density transfer, design guidelines (open space tracts, tree tracts, critical areas and their buffers), conservation easements, and other innovative techniques, such as the open space tax program. AR 690-691, AR 695, AR 808.

The County's Transfer of Development Rights provisions, ch. 20.62 TCC, are an innovative means of providing for a variety of rural densities while serving other GMA goals, as well. This program provides the opportunity and incentive for rural property owners to limit development of their rural lands to lower densities than those otherwise allowed by selling development rights that are transferable to designated residential receiving areas within the County. TCC 20.62.020. AR 1638-1641. Moreover, overlay County Shoreline regulations, applicable in rural areas, require a minimum lot area of 10 acres in the natural shoreline environment. AR 1642. The County also has a planned rural residential development ordinance which allows cluster development with density

bonuses in the rural area in exchange for preserving large rural areas as open space. AR 1649-1657.

The Comprehensive Plan is composed of numerous separate plan documents including the Comprehensive Plan, itself, which focuses on the rural area and joint plans with each of the cities for the UGAs in Thurston County. AR 821. Included in these related Plans are important programs that effectively protect large rural areas from development. As part of an effort to ensure long term agriculture in the County, in 1997 the County instituted a purchase of development rights plan to preserve 942 acres of the Nisqually Valley farm land. AR 833. In 1995 Thurston County adopted an open space tax program which establishes eligibility and other rules for open space classification of property, providing substantial reductions in property taxes for owners willing to retain agricultural use of their property and forego nonagricultural development. AR 874.

The County includes in its rural designation over 162,000 acres of land designated for agricultural use of long-term commercial significance, forest lands of long-term commercial significance, and mineral lands of long-term commercial significance. AR 692.

A great variety of densities is allowed by zoning classifications in the County's rural area, including: ch. 20.08A TCC, Long Term Agriculture District, with a minimum residential density of 1 unit per 20

acres. AR 1626. Chapter 20.08C TCC, the Nisqually Agriculture District, has a minimum residential lot size of one unit per forty acres. AR 1628. Chapter 20.08D TCC, Long Term Forestry District, has a minimum residential lot size of one unit per eighty acres. AR 1630. Rural residential/resource and rural residential zones have a minimum density of one unit per five acres under ch. 20.09A TCC and ch. 20.09 TCC, respectively.

Finally, the County has unusually abundant lands preserved from development by public agencies or non-profit private entities. As of October 2002, the County Parks and Recreation Department managed 2,773 acres, including expansive natural areas within parks and several natural preserves. State and federal agencies manage approximately 49,714 acres comprised of state parks, natural area preserves, the Woodard Bay Natural Resource Conservation Area on Henderson Inlet, many recreational sites within the state's capital forest, the state and federal Nisqually Wildlife Refuge, the Black River Wildlife Refuge, and other wildlife habitat mitigation or management sites. Also, private, nonprofit, land conservation organizations have purchased land and easements to preserve important natural areas in the County. These park and natural preserve lands make up 6% of the County's rural area. AR 783-785.

D. Procedural History

On January 21, 2005, 1000 Friends filed its Petition for Review in this matter. The Petition raised issues regarding rural densities, the size of UGAs, and the County's criteria for designating agricultural lands of long term commercial significance. AR 1-3. The Petition alleged that 1000 Friends had standing solely because "staff members of 1000 Friends of Washington wrote letters to County officials and testified concerning all matters of issue in the Petition, and testified at the public hearing at the interim ordinance." AR 3. The County made a motion to dismiss for lack of standing. AR 95. The Board denied the motion. AR 318-327.

After a hearing on the merits, the Board issued its Final Decision And Order, concluding that Thurston County's Comprehensive Plan was out of compliance with GMA requirements because: (1) the County failed to establish a variety of rural densities, as required by RCW 36.70A.070(5)(b); (2) the County's UGAs, by containing greater than 25% excess of supply over projected demand for urban lands through 2025, did not comply with RCW 36.70A.110; and (3) the County's criteria for designation of agricultural resource lands, which had been adopted a decade ago and reaffirmed in November, 2003, did not comply with RCW 36.70A.060 and 36.70A.170.

Thurston County filed a timely motion for reconsideration of the

Board's final order, reiterating the lack of standing of 1000 Friends and arguing that the Board did not have subject matter jurisdiction over Thurston County's designation criteria for agricultural lands of long term commercial significance since that part of the Comprehensive Plan had been adopted in November 2003. AR 2577-2583. The Board denied the motion for reconsideration by order dated August 11, 2005. AR 2599-2607. This appeal followed. The Board issued a Certificate of Appealability on November 29, 2005, and the Commissioner of this Court issued a Ruling on February 27, 2006 granting direct review of the Board's decision by the Supreme Court.

III. ARGUMENT

A. Summary of Argument:

From its Seattle headquarters, 1000 Friends (now Futurewise), undoubtedly with good intentions, zealously pursues a mission to impose its vision of wise land use policy on local governments throughout the state, regardless of local values and circumstances and regardless of the broad range of local policy discretion allowed by the GMA. Of course, 1000 Friends, like any interest group, may participate in local GMA political processes. But when 1000 Friends does not succeed in persuading local officials to adopt "wise" land use policies in such political processes and attempts to impose its vision through legal rather

than political processes, 1000 Friends must have legal standing to do so.

A fundamental precept of our system of government is that recourse to legal remedies (as opposed to political relief) is limited to persons and entities who can demonstrate that they will suffer tangible, concrete, injury-in-fact as a result of the government action which they legally challenge. 1000 Friends has not even attempted to demonstrate that it or any of its members would suffer tangible, concrete, injury-in-fact as a result of the County policies it challenges. The sole basis for 1000 Friends' claim that it has standing to obtain a legal remedy is that it participated in the County's local political processes.

The GMA purports to allow people, who have merely participated in local political processes related to the enactment of GMA plans and regulations, to petition the Growth Management Hearing Boards for legal determinations that local enactments violate requirements of the GMA. RCW 36.70A.280(2). The GMA purports to allow such people to petition for legal remedies under the GMA even though they have not satisfied the fundamental prerequisite for legal relief of showing that they would suffer injury-in-fact as a result of the challenged enactments. *Id.* Whether a person or entity who cannot demonstrate injury in fact has a right to seek legal relief under the GMA from the Board and the Courts is an issue of first impression. Fundamental principles of separation of powers dictate

that an injury-in-fact be required for standing to petition the Board.

Even if 1000 Friends had standing to legally challenge County enactments, the Board may not second-guess local GMA policy choices merely because 1000 Friends thinks they are unwise and the Board agrees. The Board's role in reviewing local GMA comprehensive plans and development regulations is strictly limited. Moreover, each of a succession of amendments to the GMA has more strictly limited the Board's role and more broadly defined local policy discretion. These limitations are found not only in GMA provisions defining the presumption of validity, burden of proof, and standard of review, including the 1997 amendment establishing the narrower "clearly erroneous" standard, RCW 36.70A.320, they also are contained in a succession of recent legislative findings and prescriptions stressing broad local policy discretion, in general, and in specified particular areas of GMA implementation. *E.g.,* RCW 36.70A.3201, RCW 36.70A.011, RCW 36.70A.110(2).

The Supreme Court recently has stressed the narrow scope of Board review and the broad scope of local discretion under these legislative provisions. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 154 Wn.2d 224, 236-38, 110 P.3d 1132 (2005). The Board has not abided by these strict limitations on its review authority and

the broad scope of local discretion by improperly imposing policy choices on the County. Most fundamentally, the Board based its review and decision on the erroneous legal assumption that the periodic local policy review of comprehensive plans and regulations, required by RCW 36.70A.130, subjects every existing policy and regulation to Board review even though it has not been changed in any way as a result of the local policy review. AR 2548.

Even if the Board's interpretation of RCW 36.70A.130 were not erroneous, and the completion of local review does trigger a new 60 day appeal period for every preexisting local GMA provision, the agricultural lands designation criteria, which the Board deemed noncompliant and which were included in Phase One of its review, were not appealed within 60 days of the County's publication of the completion of its review through the adoption of Resolution 13039 on November 10, 2003. Since they were not appealed to the Board in a timely petition, the Board had no jurisdiction to decide whether they complied with GMA requirements.

Additionally, if the Board somehow had jurisdiction to review the agricultural land designation criteria, they were compliant with GMA. Both the actual use criterion and the minimum parcel size criterion were within the County's discretion to use in the designation of agricultural lands that were devoted to and had long-term commercial significance for

agricultural production, in accordance with RCW 36.70A.030(2) and .170(1)(a).

The County's review and update resulted in only two minor changes in the UGA designations that had been made a decade earlier. Only the minor UGA modifications were within the Board's jurisdiction and not the preexisting UGA designations that remained unchanged. The two minor UGA modifications did not violate any specific GMA requirement as they were well-within the County's "discretion...to make many choices about accommodating growth" and to include in its "urban growth area determination" a reasonable market factor and "consider local circumstances." RCW 36.70A.110(2) (as amended by Law of 1995, ch. 400, § 2). Given the presumption of validity and Petitioners' burden of demonstrating that the two UGA modifications were clearly erroneous, the Board erred in ruling that they were noncompliant with RCW 36.70A.110 because the Board found the collective UGAs to be larger than necessary to accommodate projected growth for the succeeding 20 years. The GMA UGA provisions specifically require only that UGAs be large enough to accommodate projected growth and are silent regarding whether UGAs may be too large. RCW 36.70A.110(2). This legislative concern that UGAs be large enough to accommodate growth was emphasized in a 2003 GMA amendment. RCW 36.70A.115 ("Counties...shall ensure

that...their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development...to accommodate their allocated housing and employment growth...")

Even if the Board had jurisdiction to consider all of the County's UGA designations, nearly all of which were a decade old, and a portion of which previously had been upheld by the Board, the UGA designations, considered collectively, were not in violation of any specific GMA requirement and were well-within the County's discretion.

The Board lacked jurisdiction to review the County's preexisting plan provisions and development regulations relating to rural densities. But even if the Board had authority to do so, the Board erred by failing to accord the deference to which the County was entitled in exercising its discretion to implement the broad GMA requirement to "provide for a variety of rural densities." RCW 36.70A.070(5)(b).

B. Standard of Review

The standards of review governing the Supreme Court's review of the issues raised by Thurston County, in its appeal of the Board's Orders, are set forth in RCW 34.05.570(3), the relevant subsection of the Administrative Procedures Act(APA):

> [T]he court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: (a) The order, or the statute or rule on which the order is based, is

> in violation of constitutional provision on its face or as applied; (b) the order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; (c) the agency has engaged in unlawful procedure or decision-making process, or has failed follow a prescribed procedure; (d) the agency has erroneously interpreted or applied the law; (e) the order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; (f) the agency has not decided all issues requiring resolution by the agency; (g) a motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known or were not reasonably discoverable by the challenging party at the appropriate time for making such a motion; (h) the order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or (i) the order is arbitrary or capricious.

Thurston County submits that the appealed elements of the Board orders were invalid because they violated one or more of the following APA Standards of Review: (a) the order, or the statute…on which the order is based, is in violation of constitutional provision, as applied; (b) the order is outside the statutory authority or jurisdiction of the agency; (d) the agency has erroneously interpreted or applied the law; (e) the order is not supported by evidence that is substantial in light of the whole record before the court, which includes the agency record for judicial review; and (i) the order is arbitrary or capricious.

The most relevant APA standards in this case are whether the Board exceeded its statutory authority or jurisdiction, RCW 34.05.570(3)(b) and whether the Board erroneously interpreted or applied the law, RCW 34.05.570(3)(d). In determining whether the Board erred under these standards, GMA provisions explicitly limit the Board's authority to review local GMA enactments, explicitly limit the Board's authority to interpretively elaborate upon general GMA requirements, and explicitly acknowledge broad local discretion to interpret and implement GMA requirements, in light of local circumstances which are critically important. All of these limitations on the Board's review and interpretive authority have become increasingly strict under a succession of recent GMA amendments, as a unanimous decision of the Supreme Court recently has comprehensively explained. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 154 Wn.2d 224, 236-38, 110 P.3d 1132 (2005). *See* Richard L. Settle, *Washington's Growth Management Revolution Goes to Court,* 23 SEATTLE U. L. REV. 5, 49 (1999).

The GMA strictly limits the Board's authority to review and decide that local GMA enactments are noncompliant. The GMA enactments of local governments are presumed to be valid, and the Board must defer to local policy choice unless a petitioner has satisfied the burden of demonstrating that it is clearly erroneous, RCW 36.70A.320(1), (2) and

(3). *Quadrant,* 154 Wn.2d at 236-37. The Court went on to explain that the legislature, in 1997, "took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320" to require greater deference to local enactments by changing the Board's standard of review from "preponderance of the evidence" to "clearly erroneous," quoting RCW 36.70A.3201, with added emphasis, as follows:

> In amending RCW 36.70A.320(3)... *the legislature intends that the boards apply a more deferential standard of review to actions of counties* and cities than the preponderance of the evidence standard provided for under existing law. *In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cites in how they plan for growth, consistent with the requirements and goals of this chapter.* Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the *ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.*

Quadrant, 154 Wn.2d at 237.

In light of this "clear legislative directive," the Court went on to

> hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general...Thus a board's ruling

> that fails to apply this "more deferential standard of review" to a county's action is not entitled to deference from this court.

Id. at 238. The Court explained that deference may be declined by the Board only where a local enactment violates a "specific statutory mandate." *Id.* at 240 n.8.

In addition to the Legislature's general statement of intent recognizing broad local discretion in implementing GMA goals and requirements under RCW 36.70A.3201, other GMA provisions explicitly recognize broad local discretion to implement specific GMA requirements. E.g., RCW 36.70A.011 (legislative findings recognizing local discretion to develop a "local vision of rural character"); RCW 36.70A.110(5) ("An urban growth area determination may include a reasonable land market supply factor" and "[i]n determining this market factor...counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.").

Where the Board exceeds the limitations on its review authority and fails to defer to the policy discretion accorded to local governments, the Board's actions are invalid because they are beyond its statutory authority, are erroneous interpretations or applications of the law, are not supported by substantial evidence, or, in extreme cases, are arbitrary or

capricious. RCW 34.05.570(3)(b), (d), (e), and (i).

C. Standing: 1000 Friends As A Seattle Corporation With No Interest Or Injury In Thurston County Did Not Have Standing To Bring The Petition Before The Growth Management Hearings Board In This Matter.

The GMA standing provision, RCW 36.70A.280(2) provides as follows:

> A Petition may be filed only by: (a) the state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding a matter on which a review is being requested; (c) a person who is certified by the governor within 60 days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

While Tim Trohimovich of 1000 Friends participated at the hearing before the Planning Commission, he did not show that 1000 Friends had interests that would be injured in fact by the challenged action.[6] No Thurston County resident or property owner appealed the County Commissioners' decision to approve the Comprehensive Plan and Development Regulations in the Phase One 2003 update of the Agricultural Lands Chapter or the Phase Two 2004 review of the Comprehensive Plan.

In order to have standing, in its constitutional dimension, the

[6] The only person submitting testimony on behalf of 1000 Friends was Tim Trohimovich, who gave a Seattle address when he testified. The same Seattle address shows up on the letter submitted by 1000 Friends in its comments to the Board. Mr. Trohimovich and 1000 Friends do not have a stake in Thurston County since they do not reside or own property in the County.

petitioner needs to have a personal stake in the outcome of the controversy. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977). A plaintiff must have suffered an "injury in fact", the injury must be traceable to the action of the defendant, and the injury can be redressed by a decision. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 847 (9th Cir. 2001). In practical terms, an organization must show that it or one of its members will be specifically and perceptibly harmed by the action. *SAVE v. Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978). Here, 1000 Friends has not shown how it or any member of its organization would, in fact, be harmed by the County's adoption of the 2003 or 2004 Comprehensive Plan and development regulations updates.

In the case of *Hapsmith v. City of Auburn, CPSGMHB*, 95-3-0075 (1996), the Central Puget Sound Growth Management Hearings Board noted that it applies the analysis contained in *Trepanier v. Everett*, 64 Wn. App. 380, 824 P.2d 527 (1992) to determine whether a person is aggrieved or adversely affected by a county planning action in order to have standing under the GMA. A two-part test is involved. First, the Petitioner must be within the zone of interest affected by the GMA and the enactment in question. Second, the Petitioner must allege an injury in fact. To meet the evidentiary burden when alleging an injury in fact, the Petitioner must show that the government action will cause it specific and

perceptible harm and that the injury will be immediate, concrete and specific. See, *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994).

This case is unprecedented because no person from Thurston County was a Petitioner in this case. In every other case brought before a Growth Management Hearings Board, a resident of the county or city at issue was one of the Petitioners. 1000 Friends has not shown and cannot show that its interests are within the zone of interest to be protected by the challenged action. *Wells v. Western Washington Growth Management Hearings Board*, 100 Wn. App. 657, 997 P.2d 405 (2000). 1000 Friends can allege no injury in fact in relation to the County's actions in this matter.

In *Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 53 P.3d 1 (2002), this Court held that an interest sufficient to support standing to sue must be more than simply the abstract interest of the general public. Division II of the Court of Appeals opines that to claim standing, a party must allege a judiciable controversy based on allegations of substantial personal harm. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 863-864, 103 P.3d 244 (2004); *County Alliance v. Snohomish County*, 76 Wn. App. 44, 50-53, 882 P.2d 807 (1994). A party does not have standing under the GMA unless the party produces evidentiary facts that show

immediate injury. The Board should have dismissed the Petition For Review because 1000 Friends does not have standing in Thurston County.

While the GMA purports to grant access to the Board and Courts for the adjudication of legal challenges to people who have merely participated in local political processes and cannot demonstrate injury-in-fact, RCW 36.70A.280(2), this apparent authorization may be construed as implicitly including the fundamental requirement that one does not have standing to obtain legal relief without demonstrating injury in fact. This interpretation also would be appropriate under the rule of construction calling for the interpretation of legislative provisions to preserve their constitutionality.

Separation of powers is a bedrock principle of our state and federal constitutions. Under this principle, the legislature does not have power to assign to the judiciary a function that is beyond the power and role of the judicial branch of government. Legislation that violates separation of powers is void. *State v. Thorne,* 129 Wn.2d 736, 762, 921 P.2d 514 (1996). The Washington Supreme Court relies on federal principles regarding separation of powers doctrine in order to interpret the state constitution's stand on issues. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Under well-established federal separation of powers doctrine, the power of the judicial branch is constitutionally

limited to deciding "cases and controversies" and one may invoke this power only by showing injury-in-fact. The Washington Supreme Court has stressed that our state follows federal standing doctrine. *E.g.*, *SAVE v. City of Bothell*, 89 Wn.2d 862, 866-868, 576 P.2d 401 (1978).

The only Washington case that has construed the participation standing provision of RCW 36.70A.280(2), *Project for Informed Citizens v. Columbia County*, 92 Wn. App. 290, 296-97, 966 P.2d 338 (1998), was presented purely with an interpretive question and not a claim that the provision would be unconstitutional unless it were interpreted to require "injury-in-fact." In addition, it appears that the organization in that case included agricultural property owners in Columbia County.

The GMA recognizes that the Board, in effect, is a specialized court, whose sole authority is to determine whether challenged actions violate GMA statutory requirements. Thus, the GMA grants this adjudication function interchangeably to the Board or a court, if the parties agree. RCW 36.70A.295(1). Since the parties may seek adjudication and legal relief from either the Board or a court, the fundamental principle of standing, demonstrating "injury-in-fact" must limit access to both and, under separation of powers, the legislature may not provide otherwise.

D. The Board Based Its Review And Decision On The Erroneous Legal Assumption That The Periodic Local Reviews Required By RCW 36.70A.130 Make Every Provision Of The Reviewed Comprehensive Plan And Development Regulations Subject To Board Review Even If They Were Not Changed In Any Way.

Under the Board's interpretation of RCW 36.70A.130, there is an 'open season' to challenge local comprehensive plan provisions and development regulations every seven years no matter how long ago they were adopted; that they were never appealed within 60 days of their adoption; or, if appealed, that they were upheld in previous Board decisions. The Board's interpretation would virtually negate GMA's strict repose provision requiring that local GMA enactments be appealed within 60 days, (RCW 36.70A.290(2)) and this court's repeated recognition of our state's strong policy in favor of finality in land use decision-making. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241(2001); *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 4 P.3d 123 (2000).

The Board erred by inferring such a radical change in GMA law from the requirement that local governments review their GMA plans and regulations every seven years. Of course, local amendments resulting from the required review would be appealable to the Board within 60 days. But the Legislature did not say or clearly imply that the required seven-year review exposed not just resulting revisions, but all existing

comprehensive plan provisions and development regulations, to Board review.

E Subject Matter Jurisdiction: The Board Did Not Have Subject Matter Jurisdiction Over The County's Criteria And Designation Of Agricultural Lands Of Long Term Commercial Significance Because That Part Of The Comprehensive Plan Was Adopted In November 2003 And No Appeal Occurred Within Sixty Days Of Publication Of The Resolution.

RCW 36.70A.130(4) provides a schedule for all 39 counties of the State of Washington to review and, if needed, revise their comprehensive plans and development regulations every seven years. Thurston County's deadline for the required review was December 1, 2004. However, RCW 36.70A.130 also provides an option and incentives for counties that would like to begin the process early:

> Nothing in this section precludes a county or city from conducting the review and evaluation required by this section before the time limits established in subsection (4) of this section. Counties and cities may begin this process early and may be eligible for grants from the department, subject to available funding, if they elect to do so.

RCW 36.70A.130(5)(a). The County elected to conduct an early review of the Natural Resource Lands Chapter (Chapter 3) of the Comprehensive Plan and received a grant from CTED to do so.

The County's review of this Chapter included extensive public participation, including public hearings before the Planning Commission and County Commissioners during 2002 and 2003. It was never a secret

that the review process was designed to meet the requirements of RCW 36.70A.130(4). AR 1829, AR 1792, AR 1796, AR 1798, AR 1820. All of the documents, including the CTED grant, were public records. Respondent 1000 Friends was clearly aware of the review of Chapter 3. AR 1844.

Following the two year review process, the County Commissioners adopted Resolution 13039 on November 10, 2003 which included an affirmation of Chapter 3 of the Comprehensive Plan. AR 1845. On November 19, 2003, the County published notice in The Olympian newspaper that Resolution 13039 had been adopted. AR 2613. Any petition to the Board had to be filed within sixty days after publication of the Notice of Adoption.

> All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.
> ...
> (b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendments thereto.
>
> Except as provided in (c) of this subsection, for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendments thereto.

RCW 36.70A.290(2).

Following publication in November 2003, there was no petition challenging the adoption of Chapter 3 of the Comprehensive Plan until the 1000 Friends petition (which included a challenge of the agricultural lands designation criteria) on January 21, 2005, approximately 428 days after the Notice of Adoption was published in the Olympian. AR 1. The Board's decision that it had jurisdiction to review Resolution 13039 is clearly an erroneous interpretation and application of the law. The only precedent relied on by the Board is an August 2, 2004 WWGMHB decision where the same Board improperly legislated that a resolution adopting changes pursuant to a seven year update must include a specific finding that a review and evaluation took place pursuant to 36.70A.130(1)(a) and/or RCW 36.70A.130(4)(a). A review of Thurston County's resolution makes clear that Thurston County met the requirements of the statute and that two years of review, public participation and expenditure of valuable County resources should not be so easily disregarded.

The Board's conclusion boils down to one phrase in RCW 36.70A.130(1)(a) which provides:

> Legislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, **a finding that a review and evaluation has**

> **occurred and identifying the revisions made, or that a revision was not needed and the reasons therefore.** (Emphasis added.)

RCW 36.70A.130(1)(a). The County has met this requirement for legislative action. First, several findings of Resolution 13039 provide that a review and evaluation has occurred.

(A) Finding No. 2: "The amendments to the comprehensive plan adopted by this resolution were prepared, considered and adopted in compliance with the county-wide planning policies." AR 1845.

(B) Finding No. 3: "The amendments to the comprehensive plan adopted by this resolution were the subject of a series of public hearings before the Thurston County Planning Commission, a public hearing before the Thurston County Board of Commissioners and separate work sessions by each body." AR 1845.

(C) Finding No. 6: The measures adopted by this resolution comply with the GMA and other governing laws and are reasonably related to the public health, safety and welfare." AR 1845.

(D) Finding No. 9: In formulating the comprehensive plan amendments adopted by this resolution, this Board has considered the goals contained in RCW 36.70A.020. The Board has weighed the goals as they apply to the subject matter of this resolution. AR 1846.

(E) Finding No. 32: Amendment to Chapter 3, Natural Resources Lands, to update references, data and policies in compliance with the Growth Management Act, with the following findings... AR 1850.

These findings describing the County's actions of reviewing its Comprehensive Plan for compliance with the GMA, holding public hearings, holding work sessions, and specifically identifying findings relating to Chapter 3, meet the requirement of having a finding that a

review and evaluation occurred.

In an attempt to legislate, the Board has added a requirement that the Ordinance must list RCW 36.70A.130 somewhere in a finding. However, the statute is silent on a requirement of citing specifically to RCW 36.70A.130 which is entitled, "Comprehensive plans-Review-Amendments." This is unnecessary as Resolution 13039 starts out, "A RESOLUTION amending the Thurston County Comprehensive Plan..." Additionally, a review of the findings makes clear that Resolution 13039 is an amending resolution involving the GMA and Thurston County's Comprehensive Plan. The Board has misinterpreted RCW 36.70A.130 by holding that it requires a finding specifically identifying RCW 36.70A.130.

The Board also ruled that Resolution 13039 did not qualify as a review under RCW 36.70A.130 because it did not state reasons for deciding not to revise the reviewed Plan provisions, under the requirement in subsection (1)(b); "a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefore." This interpretation and application of subsection (1)(b) was erroneous for two reasons. First, this subsection, on its face, applies only to counties and cities "not planning under RCW 36.70A.040." Unquestionably, Thurston County is required to plan under the GMA.

Second, even if the County were subject to subsection (1)(b), the County clearly complied with the plain language of this requirement. Resolution 13039 did identify the revisions being made to Chapter 3 in Finding No. 32, AR 1850, and Attachment K to Resolution 13039, a copy of all revisions made to Chapter 3. AR 1852. Since revisions to Chapter 3 were made, the County was not under an obligation to provide reasons why revisions were not made, under the plain language of subsection (1)(b).

The Petition before the Board, as it relates to the agricultural lands designation criteria in Chapter 3 of the Thurston County Comprehensive Plan, was not timely filed under RCW 36.70A.290(2). The Petition was filed more than a year after the expiration of the limitation period of 60 days after notice was published of adoption of the challenged provisions. Thus, the Board did not have subject matter jurisdiction over that portion of the Petition challenging designation criteria for agricultural lands of long term significance.

Even if the Board had subject matter jurisdiction, the Board exceeded its review authority and substantively erred in concluding that the County could not use twenty-acre parcel size and agricultural use

designation criteria for agricultural lands of long-term significance.

WAC 365-190-050(1)(e) specifically allows a County to use parcel size as a criterion and not farm size as the Board ruled. *See also, Orton Farms, LLC, et al., v. Pierce County*, CPSGMHB No. 04-3-0007c, Final Decision And Order (August 2, 2004), p.26.

An actual use criterion for agricultural resource lands designation was addressed by this Court in *dicta,* unnecessary to its decision, in *Redmond v. Growth Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998). While the majority opinion said the 'present or intended' use criterion was improper, a concurring opinion by Justice Sanders persuasively reasoned, in depth, that the *dicta* in the majority opinion was contrary to the plain language of "primarily devoted to" in the operative GMA provision, RCW 36.70A.030(2).

> "Agricultural land" means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees . . . finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production. RCW 36.70A.030(2). That is, "agricultural land" has two attributes: (1) land primarily *devoted* to commercial agricultural production; and (2) land that has *long-term commercial significance* for continued agricultural production. The majority writes "land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production." Majority at 53 (emphasis added). Thus, according to the majority, it is possible that land

> upon which a crop has not grown for 25 years may nevertheless be "devoted to" agriculture. This conclusion is contrary to the plain meaning of the statutory text... .

Id., 136 Wn.2d at 60-61.

F. The Board Did Not Have Authority To Rule That Urban Growth Areas Established In 1994 Were Too Large.

The UGAs of Olympia, Tumwater, Lacey and Yelm were established in 1994. The claim in the Petition challenging the County UGA, as a whole, should have been dismissed because it amounts to relitigation of claims and issues that had been determined in a prior case before the Board in 1995.

In *Reading v. Thurston County*, WWGMHB 94-2-0019 (1995), the petitioners challenged the adoption of the Olympia UGA. In that case, the Board noted that the

> precise boundaries and population figures for the North County area were developed by the cities of Lacey, Olympia, and Tumwater in conjunction with Thurston County by means of a 1988 Interlocal Agreement and participation in the Thurston Regional Planning Council. The Thurston County Commissioners' adoption of the Joint Comprehensive Plan ratified the boundaries and population projections established by the TRPC.

Reading v. Thurston County, p. 11. *See* Appendix E.

As in this case, the petitioners in the *Reading* case complained that the population projection was fundamentally flawed. But the Board specifically upheld the population projection to the year 2015. The Board

in *Reading* noted that RCW 36.70A.110(2) provides in part that the UGAs established in a comprehensive plan are to provide for the urban growth that is projected to occur in a county for the succeeding twenty year period. The Board stated:

> After reviewing this record, we are mystified by petitioner's claim that no land capacity analysis took place. The plan itself and the foundational material upon which it was based are replete with charts, maps, information, showing the amount of land in the Olympia municipal limits and UGA as well as existing and projected housing units, commercial areas, and industrial areas. This record contains an excellent land capacity analysis on which local decision makers could rely.

Reading at p. 12. The Board further found that the Olympia UGA was based on:

> Exceptionally well developed series of goals and policies of the comprehensive plan in the regional transportation plan. The anti sprawl, in-filling, minimum densities and compact development features of both plans, assuming proper development regulations are later adopted, complies with the omnipresent anti-sprawl foundation of the Act.

Reading at p. 12. The fundamental principles of *stare decisis, res judicata,* and *collateral estoppel* are designed to provide finality and repose. The Board erred in allowing the relitigation of County UGA policy choices made in 1994. *Mountlake Community Club v. Hearings BD.*, 110 Wn. App. 731, 739-740, 43 P.3d 57 (2002).

G. The Board Misapplied And Misconstrued RCW 36.70A.110 In Concluding The County's UGAs Are Too Large.

Even if the Board had jurisdiction to review the County's UGA designation, the Board legally erred and exceeded its authority by deciding the UGA was noncompliant with RCW 36.70A.110 because it was larger than necessary to accommodate projected population growth.

The County properly used the population projection of the OFM in collaborating with the cities and towns of Thurston County to accommodate projected growth. The County's use of a 38 % market factor in sizing the UGA was "reasonable," based on "local circumstances," and well within the County's "discretion...to make many choices about accommodating growth." RCW 36.70A.110(2). The UGA designations were well within the County's "broad range of discretion," on the basis of "full consideration of local circumstances" to harmonize GMA goals and make policies for the County's future. RCW 36.70A.3201. Under the limitations on the Board's authority to interfere with local policy discretion in implementing GMA requirements, the Board had no basis to conclude that the County's UGA sizing was clearly erroneous.

The Board legally erred and exceeded its authority in ruling that Thurston County's UGA is oversized because its capacity exceeds a 25%

market factor. There is no specific GMA requirement imposing maximum size limitations on UGAs. The only specific GMA requirements regarding UGA sizing mandate that UGAs be *large enough* to accommodate projected growth. Indeed, the GMA was amended in 2003 to stress that counties and cities are required to "provide sufficient capacity of land suitable for development ...to accommodate their allocated housing and employment growth." RCW 36.70A.115.

In *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), this Court recognized that the growth management hearings boards do not have the authority to impose a bright line rule of a minimum four dwelling units per acre as defining appropriate urban density. The *Viking* court noted that the GMA itself contains no such rule or requirement. Likewise, the Board does not have the authority to impose a 25% market factor rule as it did in this case, because the GMA imposes no such specific requirement, and, absent specific statutory requirement, the County must be accorded a broad range of discretion by the Board. *Id. Quadrant, supra,* 154 Wn.2d at 240 n.8.

Consider the County's growth experience in the last few decades. The City of Rainier was a sleepy town of less than 400 people from 1950 to 1970, when it exploded 133% to 891 people in 1980. Things were calm again in the 1980s, but from 1990 to 2000 the population grew another

50%. Similarly, Yelm grew 106% from 1970 to 1980. The City was stable in the 1980s and then grew an astounding 164% from 1990 to 2000. Yelm's exploding growth was enabled by its first ever sewer system. The City of Tenino has now been awarded a grant for a sewer system and can be expected to experience similar growth. In part, this huge percentage of growth is simply because in a small town a few new subdivisions that would be inconsequential in a larger city are greater in relative terms to the existing population.

H. Thurston County's Comprehensive Plan and Development Regulations Provide For A Variety Of Rural Densities

The Board legally erred and exceeded its authority in ruling that the County update was noncompliant with the GMA by not providing a variety of rural densities. Given the County's unique local circumstances and its utilization of a broad range of innovative regulatory techniques, the County is well within its discretion in providing for a variety of rural densities.

RCW 36.70A.070(5)(a) & (b) provides:

> (5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest or mineral resources. The following provisions shall apply to the rural element:
> (a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a

written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.
(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. **In order to achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.**

RCW 36.70A.070(5)(a) & (b) (emphasis added). The County has done as the GMA broadly authorizes in providing for a variety of rural densities.

Resolution 13234, adopting the 7 year review revisions on November 22, 2004, could not have made this more clear in the following findings:

Excerpt from Finding No. 16: "The Comprehensive Plan allocates approximately eighty-percent of the rural area located outside the cities and their urban growth areas for resource use and rural residential at densities ranging from 1 unit per 5 acres to 1 unit per 80 acres. An additional 1.9 percent is designated as parks and public preserves. Over 173,000 acres of the county is enrolled in an open space or similar tax program that requires the land to remain undeveloped. The county owns conservation easements on over 940 acres in the Nisqually Valley. The Comprehensive Plan policies and associated development regulations permit or require clustering, transfer of development rights, purchase of development rights, creation of conservation and open space tracts, creation of tree tracts, and establishment of critical areas buffers and setbacks to further reduce sprawl. The urban growth areas concentrate development and provide for urban densities. This Goal is closely harmonized with Goal 8, and also with Goals 1, 4, 9, and 10. AR 690-691.

Finding No. 22: "A variety of rural densities is provided for in Thurston

County's Rural Element through the use of urban growth areas, rural-density zoning, purchase of development rights and transfer of development rights programs, designation of forestry and agricultural lands, cluster development as permitted under RCW sections 36.70A.030(15), 36.70A.070(5)(b), 36.70A.177 and other innovative programs. AR 695.

In reaching its decision, the Board focused solely on the amount of rural land zoned 1 unit per 5 acres. The Board's analysis ignores the clear language in RCW 36.70A.070(5)(b) which states,

> In order to achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques...

What the statute does not say is that a county may achieve a variety of densities only by specific zoning of a required range of densities. Absent specific GMA requirement, local discretion is entitled to deference by the Board. *Quadrant,* 154 Wn.2d at 240 n.8.

As the above findings show, the County has utilized all of the innovative techniques to achieve a variety of rural densities authorized by RCW 36.70A.070(5)(b). The County provides for clustering, density transfer, design guidelines (open space tracts, tree tracts, critical areas and their buffers), conservation easements, and other innovative techniques such as the open space tax program. 1000 Friends contention that only specific zoning can provide a variety of rural densities ignores the plain language of the statute and ignores the County's discretion to implement

GMA requirements on the basis of local circumstances.

The Board ignored the important local circumstance as stated in the Findings of Resolution 13234, that the County has extensive natural resource lands interspersed in its rural areas. AR 692. Instead of including much of the forest, mineral and farm lands in rural residential property, the County elected to protect large tracts of land by designating them under the GMA as "resource lands of long term commercial significance." AR 692. Thurston County has over 162,000 acres of land designated for agricultural use of long-term commercial significance, forest lands of long-term commercial significance and mineral lands of long-term commercial significance. AR 692.

Within designated forest lands, residential densities generally are limited to one unit per 80 acres, except for smaller ownerships where residences, if clustered, can achieve a density of one unit per 20 acres. AR 776. Within designated agricultural lands, residential densities are limited to one unit per 20 acres with one exception. AR 777. Within designated agricultural lands in the Nisqually Valley, residential densities are limited to one unit per 40 acres, unless residences are clustered, allowing a density of one unit per five acres. AR 777.

Other Thurston County regulations contribute to the variety of rural densities. The Shoreline Master Program provides that within the

natural shoreline environment, residential development is limited to a minimum lot area of ten acres. AR 1642. Further, as of October 2002, the Thurston County Parks and Recreation Department manages 2,773 acres, including expansive natural areas within parks and several natural preserves.

In addition to County parks and open spaces, state and federal agencies manage approximately 49,714 acres in the County comprised of state parks, natural area preserves, the Woodard Bay Natural Resource Conservation Area on Henderson Inlet, many recreational sites within the state's capital forest, the state and federal Nisqually Wildlife Refuge, the Black River Wildlife Refuge, and other wildlife habitat mitigation or management sites. In addition, private groups have purchased land and easements to preserve important natural areas in the County.

The appellate courts have recognized that many planning tools are available to counties in protecting the rural environment and provide for a variety of rural densities.

> Furthermore, the GMA allows for the use of "other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character." The Board found that the County's adoption of other regulations to protect the rural character was persuasive alternatives in light of the County's unique local circumstances. These other regulations included addressing visual compatibility, instituting a 5% limit on building coverage, drafting

> "excellent" Planned Residential Development ordinance, and storm water protection.

WEAN v. Island County, 122 Wn. App. 156, 168-169, 93 P.3d 885 (2004). Thurston County uses many of these same tools to create a variety of rural densities. The Board legally erred and exceeded its authority in ruling that the County was noncompliant with GMA by failing to provide for a variety of rural densities.

IV. CONCLUSION

The County submits that the Board lacked jurisdiction to hear the 1000 Friends' Petition because petitioner lacked constitutional standing and attempted to challenge policy determinations that were established a decade ago. Even if petitioner was not barred from challenging long-established policies, the Petition was untimely in relation to its challenge of agricultural resource lands designation criteria in Chapter 3 of the Plan because the Petition was not filed within 60 days of the County's 1993 adoption of the Chapter 3 update. The County respectfully requests that the Court reverse the Board for failing to dismiss the Petition or issues raised in the Petition on the foregoing bases.

If the Court reaches the merits of the Board's decisions on the substantive issues raised in the Petition, the County submits that the Board legally erred and exceeded its authority in failing to abide by the GMA's

increasingly strict limitations on the Board's review authority, and respectfully requests that the Court reverse the Board's rulings that the County's agricultural lands designation criteria, Urban Growth Area designations, and provisions for a variety of rural densities were clearly erroneous.

DATED this 26th day of May, 2006.

EDWARD G. HOLM
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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on May 26, 2006.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: May 26, 2006

Signature: Martha P. Lantz

APPENDIX

A. Final Decision And Order

B. Order On Motion For Reconsideration

C. Order On Motions To Dismiss

D. RCW 36.70A.130. Comprehensive plans—Review--Amendments

E. *Reading v. Thurston County*, WWGMHB 94-2-0019 (Final Decision And Order 3/23/05), page 231 of the WWGMHB January 2005 digest update.

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

1000 FRIENDS OF WASHINGTON Petitioners, v. THURSTON COUNTY, Respondent, And, WILLIAM AND GAIL BARNETT AND ALPACAS OF AMERICA, Intervenors.	Case No. 05-2-0002 **FINAL DECISION AND ORDER**

I. SYNOPSIS OF DECISION

Thurston County was one of the first counties in this Board's jurisdiction to engage in thorough and collaborative planning. Its commendable early efforts led to the adoption of a comprehensive plan in 1995 on which the County has largely relied in meeting its update requirements under RCW 36.70A.130. In 2002, the County adopted its Buildable Lands Report, a thorough and well-documented analysis of land available for development and projected demand for such lands through 2025. In 2004, Thurston County met its deadline under RCW 36.70A.130(4) to timely conduct a review and, if needed, revision of its comprehensive plan and development regulations to ensure compliance with the Growth Management Act (GMA) (Chapter 36.70A RCW).

In this decision, the Board is asked to determine whether Thurston County's 2004 update of its comprehensive plan and development regulations complies with the requirements of RCW 36.70A.130 to "review and, if needed, revise its comprehensive plan policies and development regulations to ensure the plan and regulations comply with the requirements of this chapter." RCW 36.70A.130(1).

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We observe that many elements of the County's comprehensive plan and development regulations further the goals and requirements of the GMA in creative and impressive ways and are compliant. However, we find there are several areas in which the County did not meet its update requirements.

First, Thurston County has not revised its Rural Element as necessary to comply with the GMA. It has relied upon its earlier plan provisions to continue a policy of allowing rural residential development in high density zones -- Residential – One Unit per Two Acres; Residential – One Unit per One Acre; Residential – Two Units per One Acre; and Residential – Four Units per Acre -- without complying with the GMA requirements for limited areas of more intensive rural development (LAMIRDs). It has also allowed rural densities in its RR 1/5 zone to develop at densities of one dwelling unit per four acres. While the County argues that it should not have to disturb policies it established years ago for these areas, this argument fails to address the update requirement to revise existing policies where necessary to ensure compliance with the GMA. RCW 36.70A.130. These policies and regulations create intense rural residential densities without meeting GMA requirements for limiting those areas and are therefore non-compliant. RCW 36.70A.070(5)(d). The County further has failed to establish a variety of rural densities in the rural area as required by RCW 36.70A.070(5)(b) by establishing no rural designations or zones that have less intense densities than one dwelling unit per five acres.

Second, the County's urban growth areas (UGAs) provide a significant excess of land supply over projected demand for such urban lands through 2025. Both land supply and projected land demand were reviewed for purposes of its buildable lands analysis in 2002. Buildable Lands Report, September 2002. At that time, it was determined that there was sufficient land in the UGAs to accommodate projected growth. However, the buildable lands analysis also showed that there was a significant excess of available residential lands in the urban areas over the projected demand for such lands through 2025. The UGA boundaries

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established in the 2004 update continue to provide excess lands within the UGA boundaries beyond the demand calculated on the basis of the OFM population projection chosen by the County. This excess of urban land supply for the population allocated to (and therefore land demand projected for) urban growth areas during the 20-year planning horizon fails to comply with RCW 36.70A.110. In addition, two cities, Tenino and Bucoda, sought to have their urban growth areas enlarged to accommodate development to support sewer systems for those UGAs. The County concurred and expanded areas in the Tenino and Bucoda UGAs, but did not adjust the population allocations to comport with the land supply the UGA boundaries provide. This, too, fails to correlate demand for urban lands with the supply of those lands as required by RCW 36.70A.110.

Finally, the County has adopted designation criteria for agricultural resource lands that exclude lands that otherwise meet the statutory criteria for designation. The first of these excludes lands that are not currently being used for agriculture from designation as agricultural resource lands. The Supreme Court has determined that the statutory definition of agricultural lands is based on whether the lands are "in an area where the land is actually used *or capable of being used* for agricultural production." *City of Redmond v. Central Puget Sound Growth Management Hearings Board,* 136 Wn.2d 38, 53, 959 P.2d 1091, 1998 Wash. LEXIS 575 (1998). The second challenged County agricultural lands designation criterion requires a predominant parcel size of 20 acres or more. Regardless of common ownership or use, farms consisting of more than one parcel of less than 20 acres would not be conserved under this criterion. Since farm size is not equivalent to parcel size, this criterion may exclude viable farms from conservation. For these reasons, both of these policies fail to comply with RCW 36.70A.060, and 36.70A.170.

Although Petitioner has requested a finding of invalidity as to the noncompliant provisions of the rural and urban element (and their implementing development regulations), we decline to enter an invalidity finding at this time. The record before the Board does not persuade us

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that inconsistent development will occur during the remand period such that proper planning cannot take place without the imposition of invalidity. However, if circumstances change and Petitioner brings forward a basis for believing that substantial interference with the goals of the GMA may be occurring during the remand period, we would consider setting a compliance hearing to rule upon a properly supported motion to impose invalidity before the compliance period expires. RCW 36.70A.330(4).

II. PROCEDURAL HISTORY

On November 22, 2004, the Thurston County Commissioners adopted Resolution No. 13234 and Ordinance No. 13235. Both legislative enactments, by their terms, were adopted to comply with the requirement in RCW 36.70A.130 that the County review and, if necessary, revise its comprehensive plan and development regulations to ensure the plan and regulations comply with the Growth Management Act (Ch. 36.70A RCW), no later than December 1, 2004. RCW 36.70A.130(4). Resolution No. 13234 amends the County's comprehensive plan. Ordinance No. 13235 amends the County's development regulations

Petitioner, 1000 Friends of Washington (now known as "Futurewise"), filed a petition for review of these two adoptions on January 21, 2005. A prehearing conference was held on February 17, 2005. On March 23, 2005, the County filed a Motion to Dismiss or Limit Issues arguing that the Petitioner had failed to join cities as indispensable parties and that the appeal of the urban growth areas (UGAs) was time barred. Petitioner opposed the motion, Petitioner Futurewise's Response to Motion to Dismiss or Limit Issues, April 4, 2005. The Board denied the County's motions. Order on Motions to Dismiss, April 21, 2005.

On April 27, 2005, Petitioner requested permission to file a motion to add the League of Women Voters of Thurston County as a Petitioner. Request for Permission to File Motion and Motion to Add the League of Women Voters of Thurston County as a Petitioner. The County opposed the motion. Respondent's Opposition to Petitioner's Motion to Add the

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League of Women Voters of Thurston County as a Petitioner, May 9, 2005. This motion was denied:

> There is no explanation provided in the Petitioner's request why this motion could not have been brought within the timelines set in the Prehearing Order. Nor is any excuse offered for the failure of the proposed petitioner to file a timely petition for review itself. At this stage in the proceedings, it is unduly burdensome on the County and the Board to be considering a new issue that apparently could have been raised in the timeframe set by the Prehearing Order.

Order Denying Leave to File Motion, May 16, 2005.

On May 20, 2005, Intervenor William and Gail Barnett and Alpacas of America moved to intervene in this case. Intervenor owns property that was added to the Tenino UGA in the County's 2004 update of its comprehensive plan. Arguing that Intervenor had only recently learned that this case "directly affects the Tenino UGA," Intervenor submitted the substance of its brief with its motion. Motion to Intervene by William and Gail Barnett and Alpacas of America, and Statement of Issues and Argument Concerning the Tenino UGA, May 20, 2005. The parties had no objection and intervention was granted subject to certain conditions. Order Granting Intervention to William and Gail Barnett, and Alpacas of America, June 3, 2005.

The County moved to supplement the Index to the Record with Index Nos. 466 – 528. Motion to Supplement the Record, April 4, 2005. Petitioner had no objection and the Index was supplemented as the County requested. Order on Motion to Supplement the Record, May 5, 2005.

At the hearing on the merits, the Board allowed the parties to submit additional materials in response to Board questions. As part of its post-hearing submission, the County provided the Board with the Buildable Lands Report for Thurston County, September 2002 (Index No. 43); the Population and Employment Forecast for Thurston County, Final Report (Index No. 208); and the Population and Employment Forecast for Thurston County, Volume II:

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Appendix (Index No. 209). The City of Tenino also asked and was granted leave to supply the Board with answers to its questions concerning adopted updated development regulations. This was submitted in the form of the Letter of Dan Carnrite, Senior Planner, to the Board, dated June 21, 2005. Intervenor submitted a blow-up of the Thurston County buildable lands map and post-argument brief. Intervenors' Post-Hearing Brief, June 23, 2005. Petitioner objects and moves to strike the post-hearing brief submitted by Intervenor as submitting additional argument. Petitioner Futurewise's Objection to Post-Hearing Arguments. To the extent that the Intervenor's brief submits argument rather than responsive materials, Petitioner's motion to strike is granted.

III. ISSUES PRESENTED[1]

1. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.070, RCW 36.70A.110(1) and RCW 36.70A.130 when they allow, through several rural area designations totaling over 21,000 acres, development at densities of greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA?

2. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.070 and RCW 36.70A.130 when they fail to provide for a variety of rural densities, providing instead that the only GMA compliant rural designations allow a uniform one unit per five acres?

3. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.110 and RCW 36.70A.130 when the ordinances establish *urban growth areas* that substantially exceed the capacity necessary to accommodate the Washington *Office of Financial Management* population forecast adopted by the County, even assuming a 25 percent market factor? This issue includes UGAs that preexisted these ordinances that were too large and a UGA expansion effected by these ordinances.

---

[1] Petitioner elected not to pursue Issue No. 5 of the Prehearing Order: "Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.020(1), RCW 36.70A.110 and RCW 36.70A.130 when they allow densities in unincorporated *urban growth areas* of less than 4 units per acre?" Petitioners' Futurewise's and League of Women Voters Prehearing Brief at 29. An issue not addressed in petitioner's brief is considered abandoned. *WEC v. Whatcom County,* WWGMHB Case No. 95-2-0071 (Final Decision and Order, December 20, 1995).

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4. Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.020(8), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.050 and RCW 36.70A.130 when they fail to designate and conserve hundreds of acres of land that meet the GMA criteria for agricultural lands of long term commercial significance?

5. Does the continued validity of the violations of RCW Title 36.70A in Section 7 of Ordinance 13235 described above, substantially interfere with the fulfillment of the goals of the Growth Management Act such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302?

IV. BURDEN OF PROOF

For purposes of board review of the comprehensive plans and development regulations adopted by local government, the GMA establishes three major precepts: a presumption of validity; a "clearly erroneous" standard of review; and a requirement of deference to the decisions of local government.

Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and amendments to them are presumed valid upon adoption:

> Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

RCW 36.70A.320(1).

The statute further provides that the standard of review shall be whether the challenged enactments are clearly erroneous:

> The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

RCW 36.70A.320(3)

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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Within the framework of state goals and requirements, the boards must grant deference to local government in how they plan for growth:

> In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (in part).

In sum, the burden is on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly erroneous and thus within the framework of state goals and requirements, the planning choices of local government must be granted deference.

V. DISCUSSION

Issue No. 1: Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.070, RCW 36.70A.110(1) and RCW 36.70A.130 when they allow, through several rural area designations totaling over 21,000 acres, development at densities of greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA?

Positions of the Parties

Petitioner argues that the County's comprehensive plan creates rural land use designations that are neither rural in density nor compliant with the statutory provisions for limited areas of more intensive rural development (LAMIRDs). Petitioners Futurewise's and League of

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Women Voters of Thurston County Prehearing Brief at 8-14.[2] Petitioner points to the following designations of rural lands in the County's comprehensive plan: Residential – One Unit per Two Acres; Residential – One Unit per One Acre; Residential – Two Units per One Acre; and Residential – Four Units per Acre. Index No. 89, Land Use Chapter Attachment Table 2-1A Percentage of Land Allocated for Rural Uses, p. 2-19. Petitioner then points to the provisions in the County's development regulations (zoning code) that allow rural residential densities greater than one dwelling unit per five acres. Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 9; Index No. 64. Petitioner urges that allowable residential densities on rural lands may not exceed one dwelling unit per five acres unless the rural designation complies with the requirements for a LAMIRD pursuant to RCW 36.70A.070(5)(d).

The County responds that the 2004 comprehensive plan update did not change the zoning densities in the rural area "because these rural densities already comply with the Growth Management Act." Respondent's Prehearing Brief at 8. The County references its criteria for higher density rural zones and asserts that these criteria reflect local circumstances and pre-existing development. *Ibid* at 10-11. The County asserts that new or expanded areas of this zoning will not be allowed and no new areas will be designated for these densities without going through a LAMIRD designation process. *Ibid* at 8-9.

Board Analysis

We first note that the update provisions of RCW 36.70A.130 require the County to review its comprehensive plan and development regulations to ensure that they comply with the GMA:

> A county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and

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[2] The Petitioner's brief was submitted on April 27, 2005 before the Board had ruled that the League of Women Voters of Thurston County could not be added as an additional petitioner. Order Denying Leave to File Motion, May 16, 2005.

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> regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.

RCW 36.70A.130(1) (in pertinent part)

This requirement imposes a duty upon the County to bring its plan and development regulations into compliance with the GMA, including any changes in the GMA enacted since the County's adoption of its comprehensive plan and development regulations. While some provisions of the County's plan and development regulations may not have been subjected to timely challenge when originally adopted, a challenge to the legislative review required by RCW 36.70A.130(1) and (4) opens those matters that were raised by Petitioner in the update review process. See RCW 36.70A.280(2). It is not, therefore, sufficient for the County to assert that its provisions regarding rural densities have not been changed; those provisions must themselves comply with the GMA.

As Petitioner points out, densities that are no more than one dwelling unit per five acres are generally considered "rural" under the GMA. *Durland v. San Juan County,* WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7, 2001); *Sky Valley v. King County,* CPSGMHB Case No. 95-3-0068c (Final Decision and Order, March 12, 1996); *Yanisch v. Lewis County,* WWGMHB Case No. 02-2-0007c (Final Decision and Order, December 11, 2002); but see *Vashon-Maury v. King County,* CPSGMHB Case No. 95-3-0008c (Final Decision and Order, October 23, 1995); and *City of Moses Lake v. Grant County,* EWGMHB Case No. 99-1-0016 (Final Decision and Order, May 23, 2000) (holding that rural densities should be no greater than one dwelling unit per *ten* acres). Densities that are not urban but are greater than one dwelling unit per five acres are generally deemed to promote sprawl in violation of goal 2 of the GMA. RCW 36.70A.020(2).

The County does not argue that rural residential densities in excess of one dwelling per five acres comply with the GMA. Instead, the County argues that its areas of higher rural densities are compliant because they existed before the enactment of the GMA and contain

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the areas where more intensive rural residential uses exist. Respondent's Prehearing Brief at 10. Prior to the adoption of RCW 36.70A.070(5)(d) in 1997, there had been no legislative guidance on how communities should deal with existing development in the rural areas that was already more intensive than a rural level of development. When the County adopted its comprehensive plan in 1995, it developed its own criteria for determining how to contain such areas of more intensive development in the rural areas. In 1997, the legislature adopted the provisions of RCW 36.70A.070(d) that set the requirements for "limited areas of more intensive rural development" (LAMIRDs). ESB 6094 (1997). Now that there is direction in the GMA on how to address areas of more intensive rural development, the County's update must ensure that it complies with those terms. See *Futurewise v. Whatcom County,* WWGMHB Case No. 05-2-0013 (Order on Dispositive Motions, June 15, 2005).

While the County's brief asserts that its areas of higher rural residential densities "existed prior to the enactment of the Growth Management Act in 1990," the County does not argue that its areas of higher rural residential densities comply with the requirements of RCW 36.70A.070(5)(d). The findings in Resolution 13234 similarly indicate that these areas are not designations of limited areas of more intensive rural development (LAMIRDs). Residential LAMIRDs are addressed in RCW 36.70A.070(5)(d)(i):[3]

> Rural development consisting of the infill, development or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

To comply with RCW 36.70A.070(5)(d)(i), there must be a determination of the "built environment" as of July 1, 1990, (the date applicable to Thurston County)[4] upon which the

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[3] The other two types of LAMIRDs are recreational and tourist areas (RCW 36.70A.070(5)(d)(ii)) and small business and cottage industry areas (RCW 36.70A.070(5)(d)(iii)) – both non-residential LAMIRDs.

[4] Existing development, for purposes of creating the logical outer boundaries of a LAMIRD, is that which was in existence on July 1, 1990. RCW 36.70A.070(5)(d)(v)(A).

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establishment of logical outer boundaries for limited areas of more intensive rural development (LAMIRDs) are based. RCW 36.70A,070(5)(d)(iv). Residential LAMIRDs must be created within logical outer boundaries that contain the existing development, and they may include only limited undeveloped lands that fit within those logical outer boundaries:

> A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl.

RCW 36.70A.070(5)(d)(iv).

The Thurston County Comprehensive Plan Land Use Element contains a discussion of rural area designations. CP at 2-17 – 2-27. This discussion includes the criteria for inclusion in any of the rural area designations, including the higher density residential designations. CP at 2-24 – 2-27. None of the criteria include a review of the existence of development as of July 1, 1990, nor do they establish logical outer boundaries with reference to the statutory criteria. *Ibid.*

The County's comprehensive plan policies reflect the County's intention to only apply the statutory LAMIRD criteria to areas which have not yet been designated for high density rural residential development, or when the existing high density rural areas are expanded:

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> One dwelling unit per five acres should be the common, minimum residential density level in rural areas, except in areas already dominated by higher density development.

Housing and Residential Densities Policy 1, CP at 2-46

Thus, this policy assumes that existing high density rural residential zones need not be designated as LAMIRDs. Similarly, another comprehensive plan policy addresses existing rural residential designations and provides that they may not expand unless they are designated as LAMIRDs:

> Thurston County should not expand or intensify rural residential land use designations or zoning districts with densities greater than 1 unit per 5 acres unless these areas are designated as a limited area of more intensive rural development (LAMIRD) as defined in the GMA.

Housing and Residential Densities Policy 2, CP at 2-46

Again, this policy accepts existing high density rural residential areas without further determination that they comply with the statutory LAMIRD criteria, and even discusses the potential to expand LAMIRDs once they have been designated with logical outer boundaries.

Rural Land Use and Activities Policy 8 (CP at 2-43-44) sets criteria for designation and expansion of "commercial centers" which do not incorporate the requirements of RCW 36.70A.070(5)(d):

> Rural commercial centers should be designated only for identified rural community areas, like Rochester and Steamboat Island Road at Highway 101. These centers should serve a larger rural community than neighborhood convenience and have a greater variety of uses, while maintaining a rural character. Expansion of a Commercial Center should only be considered if it will result in a more "logical outer boundary", as defined in 36.70A.070(5) of the Growth Management Act, and if it is needed to accommodate population growth in the rural community served...

CP 2-43 – 2-44 (in part)

As is true of the other policies, this policy only applies the LAMIRD criteria of RCW 36.70A.070(5)(d) in the event of "expansion" of an area of more intense rural development.

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Rural Land Use and Activities Policy 8 does not accurately incorporate the statutory criteria for LAMIRDs; logical outer boundaries may not be based on accommodating population growth. RCW 36.70A.070(5)(d)(i) and (iv).

The policies with respect to more intensive rural development are further elaborated in the zoning code as development regulations. Thurston County's zoning code contains development regulations setting residential density levels in excess of one dwelling unit per five acres in rural areas: Rural Residential – One Dwelling Unit per Two Acres (RR 1/2) (T.C.C. Ch. 20.10); Rural Residential – One Dwelling Unit per Acre (RR 1/1) (T.C.C. Ch. 20.11); Rural Residential – Two Dwelling Units per Acre (RR 2/1) (T.C.C. Chapter 20.13); and Suburban Residential – Four Dwelling Units per Acre (SR 4/1) (T.C.C. Chapter 20.14). Index No. 64. These development regulations also fail to comply with the GMA because they do not incorporate the statutory criteria for LAMIRDs. All of these residential density levels constitute "more intensive rural development" within the meaning of RCW 36.70A.070(5)(d). If the County intends to allow them, they must conform to the statutory requirements for residential LAMIRDs. RCW 36.70A.070(5)(d)(i).

Petitioner also argues that even the Rural Residential – One Dwelling Unit per Five Acres (RR 1/5) zone exceeds a rural residential density level of one dwelling unit per five acres. Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 9. Petitioner points to T.C.C. 20.09.040(1)(a) to argue that the effective density for this zone is actually a net minimum lot size of four acres for single family residences and eight acres for duplexes. *Ibid.*

The cited zoning code provision, T.C.C. 20.09.040(1)(a), establishes a minimum lot size in the RR 1/5 zone as follows: "Conventional subdivision lot (net) – four acres for single family, eight acres for duplexes." The County does not contest that this development

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regulation allows one single family dwelling unit per four acres, rather than one dwelling unit per five acres, in the RR 1/5 zone.

This provision is of even greater concern because RR 1/5 is the *least* dense of the County's rural residential designations. The determination of proper rural density levels depends in large measure upon the GMA's strictures against promotion of sprawl. 48.3 percent of the County's rural residential areas fall into the RR 1/5 category. CP Table 2-1A at 2-18 – 2-19. With such a large portion of the County's rural area designated as RR 1/5, the net density level of one dwelling unit per four acres in the RR 1/5 zone increases the "conversion of undeveloped land into sprawling, low-density development in the rural area," in contravention of RCW 36.70A.070(5)(c)(iii).

Conclusion: The County's high density rural residential designations (SR – 4/1; RR 2/1; RR 1/1; and RR 1/2); Housing and Residential Densities Policies 1 and 2, and Rural Land Use and Activities Policy 8; and the County's development regulations implementing these designations (T.C.C. Ch. 20.10; T.C.C. Ch. 20.11; T.C.C. Chapter 20.13; and T.C.C. Chapter 20.14) fail to comply with RCW 36.70A.070(5). The residential density levels allowed in these designations are too intensive for rural areas unless they are designated as limited areas of more intensive rural development (LAMIRDs) pursuant to RCW 36.70A.070(5)(d). If the County is to allow such areas of more intensive rural development, it must establish them in accordance with RCW 36.70A.070(5)(d). T.C.C. 20.09.040(1)(a) also fails to comply with RCW 36.70A.070(5)(c) and (d) by effectively increasing the rural residential density in the RR 1/5 zone from one dwelling unit per five acres to one single-family dwelling unit per four acres.

Issue No. 2: Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.070 and RCW 36.70A.130 when they fail to provide for a variety of rural densities, providing instead that the only GMA compliant rural designations allow a uniform one unit per five acres?

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Positions of the Parties

Petitioner argues that the County's comprehensive plan fails to provide a variety of rural densities as required by RCW 36.70A.070(5)(b). Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 14. Petitioner claims that only two of the rural area designations in the County's plan require densities of no more than one dwelling unit per five acres - the Rural Residential Resource zone and the McAllister Geologically Sensitive Area District. *Ibid* at 15.

The County responds that it provides densities of one dwelling unit per twenty acres, one to forty and one to eight in non-urban zones. Respondent's Prehearing Brief at 14. The County also cites to its provisions for the transfer of development rights, its open space tax program, private conservation easements and public wildlife refuges and open spaces, and parks. *Ibid* at 14-15.

Board Analysis

The GMA expressly requires "a variety of rural densities" in the rural element of the comprehensive plan:

> The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

RCW 36.70A.070(5)(b)

The County concedes that it does predominately provide densities of one dwelling unit per five acres in the rural zone. Respondent's Prehearing Brief at 14. However, the County asserts that it has other designations that are less dense than one in five. *Ibid*. The densities that the County cites as being less intense than one dwelling unit per five acres include designations of natural resource lands. T.C.C. Chapter 20.08A applies to lands in the long-term agricultural district; Ch. T.C.C.20.08D applies to lands in the long-term forestry

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district; and T.C.C. Chapter 20.62 creates a program for transfer of development rights in long-term commercially significant agricultural lands. Rural lands are lands "not designated for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5). Thus, the designations of low-intensity resource lands do not create a variety of *rural* densities.

Rural densities, as we have discussed above, are generally no more intense than one dwelling unit per five acres. The County has designated and zoned a variety of rural areas with residential densities higher than this rural level: Residential – One Unit per Two Acres; Residential – One Unit per One Acre; Residential – Two Units per One Acre; and Residential – Four Units per Acre. The RR 1/5 zone, although stating that it limits development density to one dwelling unit per five acres, has a net density of one single family dwelling unit per four acres. T.C.C. 20.09.040(1)(a). None of these densities are rural in nature and therefore cannot be used to establish a variety of rural densities.

The GMA allows a county to achieve a variety of rural densities through innovative techniques. RCW 36.70A.070(5)(b). However, where the rural designations and zones themselves do not include a variety of rural densities, the comprehensive plan and development regulations must demonstrate how the "innovative techniques" create such varieties of densities in the rural area. The County argues that its natural shoreline environment residential zone limits densities to a minimum lot area of ten acres. Respondent's Prehearing Brief at 12. However, it is not clear how or even if this zone affects rural densities.[5] A similar problem exists with its "clustering ordinance." *Ibid* at 14. The County asserts that it "owns and funds conservation easements" but does so in the same sentence in which it refers to its transfer of development rights program, which applies

[5] Although the County references exhibits in its brief, the exhibits provided to the Board are not tabbed and an order cannot be discerned. In some instances, it does not appear that the Board has actually been provided the cited exhibit. If an exhibit has not been provided, it cannot be considered by the Board and thus will not be part of the record. It would also aid the Board if the exhibits were clearly marked and organized for reference.

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to agricultural lands rather than rural lands. *Ibid.* The Board is therefore unable to find that the County has achieved a variety of rural densities and uses through innovative techniques.

Conclusion: The County's comprehensive plan and development regulations fail to provide for a variety of rural densities as required by RCW 36.70A.070(5)(b).

Issue No. 3: Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.110 and RCW 36.70A.130 when the ordinances establish urban growth areas that substantially exceed the capacity necessary to accommodate the Washington Office of Financial Management population forecast adopted by the County, even assuming a 25 percent market factor? This issue includes UGAs that preexisted these ordinances that were too large and a UGA expansion effected by these ordinances.

Positions of the Parties

Petitioner argues that the County's urban growth areas (UGAs) are 62 percent larger than necessary to accommodate the County's growth target. Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 16. This, Petitioner argues, is well beyond the 25 percent market factor allowed under the GMA. *Ibid* at 17. Petitioner argues that urban growth areas must be sized to accommodate the OFM population projection chosen by the County and may not be "over-sized" without creating sprawling growth. *Ibid* at 19. Petitioner also argues that the County's Urban Growth Area Policy 8 (allowing expansion of urban growth areas if there is an overriding benefit to the public health, safety, and welfare) fails to comply with the GMA. *Ibid.*

The County responds that it has worked with the cities and towns of Thurston County to properly accommodate projected growth. Respondent's Prehearing Brief at 16-18. The County disputes Petitioner's contention that its UGAs are 62 percent larger than needed to accommodate projected growth; the County argues that it has allowed for 38 percent

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excess capacity in its UGAs. *Ibid* at 20. The County argues that this is a statutorily permissible market factor and a 38 percent market factor is not excessive. *Ibid*. The County also argues that the Tenino UGA was actually reduced in size; and the Bucoda UGA was expanded to deal with potential contamination of its aquifer. *Ibid* at 19-20.

Intervenor argues in support of the Tenino UGA expansion to include Intervenor's property. Intervenors' Brief. Intervenor argues that Tenino changed but did not increase its UGA size and that adding the Intervenor's property to the UGA will enable development needed to support a planned sewer facility. Intervenor's Brief at 3-4. Intervenor also challenges the sufficiency of the Petitioner's standing in this case because Petitioner did not participate in the City of Tenino's adoption of its UGA. *Ibid* at 5-8. (See footnote 8.)

Board Analysis

The requirements for creating and sizing a UGA are set out in RCW 36.70A.110. This section of the statute provides that UGAs must include areas and densities sufficient to accommodate the 20-year population projections by the Office of Financial Management (OFM):

> Based upon the growth management population projections made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve... An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

RCW 36.70A.110(2) (in pertinent part)

RCW 36.70A.110(2) provides that county UGAs shall include areas and densities sufficient to permit the urban growth projected for the county by OFM. RCW 36.70A.110(2). This provision has been interpreted to also limit the size of UGAs as well as to ensure that the

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UGA boundaries are sufficient to accommodate projected growth, in light of the anti-sprawl goal of the GMA. *Diehl v. Mason County,* 94 Wn.App. 645, 982 P.2d 543 (Div. II, 1999). "... [T]he OFM projection places a cap on the amount of land a county may allocate to UGAs." *Ibid* at 654. Thus, RCW 36.70A.110 requires that the UGAs be created to accommodate the OFM population projection for the 20-year planning horizon and also limits the size of UGAs to those lands needed to accommodate the urban population projection utilized by the county.

In this case, the County has chosen a 2025 total population forecast figure of 334,261. CP Table 2-1 at 2-12. The population forecast chosen was adopted in 1999 as a regional forecast (Population and Employment Forecast for Thurston County, Final Report, October 1999, Index No. 208) and then compared to the OFM population projections for the County in 2002. Buildable Lands Report for Thurston County, Technical Documentation, at 46 (Submitted post-hearing, Index No. 43). The medium scenario regional forecast was found to fall within one percent of the new state medium range forecast (OFM's projection) and was therefore adopted for use in the Buildable Lands Report and, subsequently, the 2004 comprehensive plan update. *Ibid.*; Thurston County Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12. That population forecast, in turn, was used to determine demand for land within the UGAs through 2025. Thurston County Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12. We note first that the Buildable Lands Report for Thurston County is an impressive and thorough analysis of land supply and demand in Thurston County. The land demand analysis in that report is well-supported and clearly explained. The County's choice to rely upon the land supply and demand analysis in the Buildable Lands Report for planning in the 2004 comprehensive plan update is a sound one.

Petitioner does not fault the population forecast chosen by the County or claim that the land supply projections are not compatible with the population projections provided by OFM.

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Instead, Petitioner focuses on the amount of land included in the County's UGAs and compares it to the projected demand for urban land. Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 31. The County's comprehensive plan acknowledges that in the urban area "approximately 38% of available residential land in 2000 will remain in the year 2025, assuming the county experiences growth consistent with state and regional forecasts, and zoning remains consistent." CP footnote 6 at 2-11. On its face, then, the County's UGAs provide a significantly greater amount of land for residential urban development than is likely to be needed to accommodate the projected population growth allocated by the County to UGAs.

The County responds that the disparity is due to a market factor. Respondent's Prehearing Brief at 22.[6] Petitioner argues that supply exceeds demand for residential land in the UGAs by 62 percent, which is excessive even if it were a market factor. Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 31. The County responds that the "7,207 acres is the unconsumed land left in 2025 which is thirty-eight percent (38%) of the total land supply of 18,799 acres." Respondent's Prehearing Brief at 20. A 38 percent market factor, according to the County, is not clearly erroneous in light of the uncertainties about how much future land will be needed for growth in the cities and towns of Thurston County. *Ibid* at 22.

The use of a "land market supply factor" is permissible under the statute to account for the vagaries of the real estate market supply. RCW 36.70A.110(2). The Central Puget Sound Growth Management Hearings Board describes the market factor as follows:

> In general, it accounts for the fact that not all vacant land will be built or all redevelopable property redeveloped, because the property owners simply will not take the necessary actions during the planning period.

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[6] Since a market factor is used to increase the available land supply, it should be applied to the 2025 land demand figure. As an example, if the projected land demand is 100 acres, a 25 percent market factor would increase the needed land supply to 125 acres.

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City of Gig Harbor, et al. v. Pierce County, CPSGMHB Case No. 95-3-0016c (Final Decision and Order, October 31, 1995)

The first problem with the County's response is that nowhere in the County's comprehensive plan is it indicated that a 38 percent market factor was utilized to increase the amount of acreage that is needed to accommodate projected urban residential growth. While the comprehensive plan acknowledges that 38 percent of urban residential land will remain unconsumed in 2025, it does not claim that the reason for this was a market factor. CP footnote 6 at 2-11.

At argument, the County claimed that the 38 percent market factor was based on overlays of critical areas and shorelines. However, the Buildable Lands Report already accounted for critical areas deductions:

> Critical area and right-of-way exclusions can reduce net density in significant amounts taken across all zoning districts as a whole, (note the difference in deduction of those jurisdictions including all critical areas and rights-of-way versus those that are much more selective, Table 12). In real terms, however, these deductions play a relatively small role in the difference between net density calculations once a parcel has been through the platting process. In addition, many jurisdictions further protect critical areas from all development pressure by placing them into Open Space or Institutional zoning categories. Overall, critical areas deductions to net density, as applied by various jurisdictions, were found to comprise less than one percent of those parcels developed between 1996 and 2000 in residential and mixed use zoning categories.

Building Lands Report, Technical Documentation, (Index No. 43) at 35.

In fact, the disparity between land supply and demand in the urban areas does not appear to be the result of a market factor at all, but appears instead to be an unavoidable consequence of the urban growth boundaries chosen by the County.

The second problem with the County's assertion that the disparity between residential land supply and projected demand is a result of a market factor is that there is no analysis demonstrating the reason for the market factor. "Although a county may enlarge a UGA to account for a 'reasonable land market supply factor,' it must also explain why this market

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factor is required and how it was reached." *Diehl v. Mason County,* 95 Wn. App. 645, 654, 982 P.2d 543 (Div. II, 1999).

The land supply analysis performed in the Buildable Lands Report concluded that the supply of residential land as of 2000 for urban Thurston County will exceed demand for urban residential land in 2025; it found a supply of 18,789 acres and a 2025 demand of 11,582 acres. Buildable Lands Report for Thurston County, September 2002. (Index No. 43), Figure II-1 at II-4. The 2004 update of the comprehensive plan accepts and utilizes these figures for residential land supply and demand in urban areas. Thurston County Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12.

However, there is no explanation in the comprehensive plan for the use of a market factor, perhaps because the buildable lands analysis appears to already account for many of the market vagaries in its own assessment of land availability. The buildable lands analysis provides an individualized look at the available land (generally on a parcel-by-parcel basis) and produces a figure for net developable land based on development assumptions established in light of the actual development trends in the area of the lands assessed. Buildable Lands Report for Thurston County, September 2002. (Index No. 43). The analysis includes a review of subdivision trends from 1995 to 1999 and residential building permits from 1996 to 2000. Buildable Lands Report for Thurston County at 32-33. Development assumptions were derived based on current comprehensive plans and development codes, recent development trends and information provided by long-range planners from jurisdictions throughout the County. *Ibid* at II – 10. The buildable lands analysis assesses many of the potential market factors and incorporates them into the figures for land supply and demand that it produces. This analysis appears to take the place of a market factor.

Since the number used in the comprehensive plan update to determine residential land supply in the Thurston County urban growth areas was derived from the buildable lands

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analysis, any market factor must be based on factors that were not already incorporated into the determination of residential land supply.

Petitioners also challenge the expansion of two UGAs – the Tenino UGA and the Bucoda UGA. Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 17 – 18. Citing to Table 2-1 of the County's comprehensive plan, Petitioner points out that the 2025 residential land demand for the Bucoda UGA is 30 acres and the corresponding land supply is 81 acres. *Ibid.* Tenino's residential land demand in 2025 is projected to be 353 acres with a corresponding land supply of 505 acres. *Ibid.* Petitioner further asserts that the County's Urban Growth Area Policy 8 (allowing expansion of urban growth areas if there is an overriding benefit to the public health, safety, and welfare) fails to comply with the GMA.

The County responds that land was taken out of, as well as added to, the Tenino UGA so that the Tenino UGA was actually reduced by 6 acres. Respondent's Prehearing Brief at 19. The Intervenor points out that the addition of its property to the UGA is necessary to finance a new sewer facility that will allow the City to encourage more intense urban development than can now be adequately served with urban levels of governmental services. Intervenors' Brief at 2-3. [7] This will allow truly urban density levels of residential development within the City limits. As to the Bucoda UGA, the County argues that expansion of its boundaries adds sufficient developable lands for projected residential growth if sewer becomes available, and reduces pressure on the existing aquifer from residential development based on septic systems. Respondent's Prehearing Brief at 19-20.

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[7] Intervenor also challenges Petitioner's standing to raise challenges to the Tenino UGA because Petitioner did not participate in the City's process in developing its comprehensive plan. However, Petitioner is not challenging the City's adoption of its plan but rather the County's adoption of UGA boundaries. Adoption of urban growth area boundaries is the responsibility of the County. RCW 36.70A.110. Petitioner participated in the County's process in adopting those boundaries and raised its concerns at that time. RCW 36.70A.280(2)(b). Since the adoptions being challenged are the County's resolution and ordinance, Petitioner has standing to bring this appeal.

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However, the fundamental problem identified by Petitioner is that the UGAs are much larger than the growth projected to be accommodated in them. It may well be, as Intervenor argues, that there are good reasons for increasing the size of the Tenino UGA. However, if the County does this, it must "show its work"[8] on the reasons for the expansion and also increase its allocated population growth to the Tenino UGA and adjust its population allocations elsewhere in the County's UGAs accordingly. Similarly, it may be reasonable for the County to adjust the Bucoda UGA boundaries to accommodate additional growth in that UGA (if that urban growth is provided with urban levels of services). However, if it does so, the County must "show its work," allocate additional population growth to the Bucoda UGA, and account for that re-allocation in the other land use designations in the county. The OFM population allocation to the county is the basis upon which the UGAs may be sized; the population growth allocations to each UGA must add up to comport with the overall county urban growth population allocation.

Urban Growth Area Policy 8(b) (CP at 2-50) provides for expansion of UGA boundaries for reasons other than accommodation of projected urban population growth:

> There can be shown an overriding public benefit to public health, safety and welfare by moving the urban growth boundary.

Urban Growth Area Policy 8(b), CP at 2-50.

This policy appears to confuse expansion of UGA boundaries with extension of urban levels of service. Under RCW 36.70A.110(4), urban governmental services may not be extended to rural areas "except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially

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[8] *Berschauer v. Tumwater,* WWGMHB Case No. 94-2-0002 (Final Decision and Order, July 27, 1994); *Association of Rural Residents v. Kitsap County,* CPSGMHB Case No. 93-1-0010 (Final Decision and Order, June 3, 1994).

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supportable at rural densities and do not permit urban development." However, this exception does not apply to the extension of UGA boundaries. UGA boundaries are to be set to accommodate projected urban population growth (RCW 36.70A.110(2)) and to contain such urban growth. RCW 36.70A.110(1). Urban Growth Area Policy 8(b) allows the extension of urban growth in violation of these provisions of the GMA and its anti-sprawl goal, RCW 36.70A.020(2).

Conclusion: The size of any UGA must be based upon the projected population growth allocated to that UGA. Since the supply of urban residential lands (18,789 acres) significantly exceeds the projected demand for such lands over the course of the 20-year planning horizon (11,582 acres), the County's UGAs fail to comply with RCW 36.70A.110. For the Tenino and Bucoda UGAs, the population projection allocations and the 2025 land demand figures based on them are not consistent with the land supply for those urban growth areas. This also fails to comply with RCW 36.70A.110.

Issue No. 4: Does the adoption of Resolution 13234 and Ordinance 13235 fail to comply with RCW 36.70A.020(8), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.050 and RCW 36.70A.130 when they fail to designate and conserve hundreds of acres of land that meet the GMA criteria for agricultural lands of long term commercial significance?

Petitioner argues that Thurston County's designation criteria are internally inconsistent because the land capability classification system and prime farmland are not the same systems, yet Thurston County's designation criterion mixes them all together and ultimately relies on prime farmland. Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 22-23. Petitioner also argues that County's criteria for designation of agricultural lands of long-term commercial significance are erroneous for three reasons: they fail to consider farmlands of statewide importance; they require that land

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actually be used for agriculture; and they require a predominant parcel size of 20 acres. *Ibid* at 24 – 29.[9]

The County responds that the Petitioner has not shown that the County's criteria for designation of agricultural lands of long-term commercial significance are clearly erroneous.[10]

The County's designation criteria for agricultural lands of long-term commercial significance are found at Chapter Three – Natural Resources, pp. 3-3 – 3-7 of the County's comprehensive plan. The County's comprehensive plan also states that almost 15 percent of land in the county is used for local agriculture. *Ibid* at 3-1.

As a first step towards designating natural resource lands, the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas (Ch. 365-190 WAC) ("Minimum Guidelines" hereafter) call for classification of natural resource land categories. WAC 365-190-040(1). WAC 365-190-050 directs counties and cities to use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as defined in Agriculture Handbook No. 210.[11] The Petitioner faults the County's classification of soils for inconsistency with the Agriculture Handbook No. 210. However, Petitioner's very abbreviated argument simply does not demonstrate how the County's classification system fails to follow Agriculture Handbook No. 210.

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[9] At the hearing on the merits, Petitioner abandoned its argument that the County erred in using an out-dated list of prime farmland soils, conceding that the list was not provided to the County in sufficient time to be included in its 2004 update.

[10] The County devoted most of its argument in its Prehearing Brief to the Petitioner's claim that the County should have included the newest list of prime farmland soils in its 2004 update. That claim was later abandoned.

[11] Although couched in mandatory terms, the Minimum Guidelines call for counties to "consider" the minimum guidelines. WAC 365-190-040(2)(b)(ii).

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Petitioner also faults the County for failing to consider farmlands of statewide importance in its classification scheme. For this argument, Petitioner relies upon the holding of the Eastern Washington Growth Management Hearings Board in *Williams, et al. v. Kittitas County,* EWGMHB Case No. 95-1-0009 (Order of Noncompliance, November 6, 1998). However, in that decision, the Eastern Board did not hold that farmlands of statewide importance must be considered in establishing a classification scheme. Again, Petitioner has failed to meet its burden of proof on this point.

On the other hand, Petitioner points to two of the County's criteria for designation of agricultural lands of long-term commercial significance that do not comply with the Growth Management Act's directives to designate and conserve agricultural resource lands. RCW 36.70A.040 and 36.70A.170. The first is the requirement in Chapter 3 of the County comprehensive plan that "Designated agricultural lands should include only areas that are used for agriculture." Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4. Lands otherwise eligible for designation as agricultural lands of long-term commercial significance may not be excluded simply on the basis of current use. Our State Supreme Court has ruled on this point:

> One cannot credibly maintain that interpreting the definition of "agricultural land" in a way that allows land owners to control its designation gives effect to the Legislature's intent to maintain, enhance, and conserve such land. . . We hold land is "devoted to" agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production.

City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wn.2d 38, 53, 959 P.2d 1091, 1998 Wash. LEXIS 575 (1998).

Therefore, agricultural lands designation criterion number three does not comply with the GMA definitions of agricultural lands. RCW 36.70A.030(2) and (10).

The second designation criterion that fails to comply with the GMA is criteria number 5, which requires that the predominant parcel size must be 20 acres or more. Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4. The

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comprehensive plan explains that the reason for this parcel size limitation is it "provides economic conditions sufficient for managing agriculture lands for long-term commercial production." *Ibid.* However, as Petitioner points out (and as the Eastern Board found in the Kittitas County case cited above) parcel size does not necessarily correlate to the size of a farm. Farms may consist of several parcels in common ownership or use (under lease for example), thus achieving the economies of scale the County appears to rely upon in restricting smaller farms from designation and conservation. While parcel size may be a factor in determining the possibility of more intense uses of the land, it is just one in many factors to consider on the question of the possibility of more intense uses of the land. WAC 365-190-050(e). Parcel size is not determinative of the size of a farm, which may consist of more than one parcel.

Parcel size itself does not correspond to farm size because it is not indicative of the amount of acreage that would be farmed together. Using predominant parcel size of 20 acres as a designation criterion may exclude viable farms in which the total acreage farmed is in excess of 20 acres in size but each of the parcels making up the farm is less than 20 acres. If size is to be used as a factor in designating agricultural lands, farm size rather than parcel size is the relevant consideration.

Agricultural land designation criteria no. 5 therefore fails to comply with RCW 36.70A.030, RCW 36.70A.060 and 36.70A.170.

Conclusion: Petitioner has failed to meet its burden of proof as to the County's classification system for agricultural lands of long-term commercial significance and any inconsistencies alleged between the comprehensive plan provisions concerning it. However, designation criteria numbers 3 and 5 fail to comply with the requirements of the GMA to designate and conserve agricultural resource lands. RCW 36.70A.060 and 36.70A.170.

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VI. INVALIDITY

Petitioner asks the Board to enter a finding of invalidity as to the comprehensive plan designations and zones that allow rural densities greater than one dwelling unit per five acres in the rural area. Petitioner Futurewise's and Thurston County League of Women Voter Prehearing Brief at 29-30.[12] Petitioner also requests that the urban growth areas be found invalid because they have resulted in an average net residential density of 1.73 dwelling units per acre in the unincorporated urban growth areas and damage to Puget Sound. *Ibid* at 32.

The County responds that all of the provisions of Resolution 13234 and Ordinance 13235 are compliant with the GMA so a finding of invalidity may not be entered. Respondent's Prehearing Brief at 25.

A finding of invalidity may be entered when a board makes a finding of noncompliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1) (in pertinent part).

We have held that invalidity should be imposed if continued validity of the noncompliant comprehensive plan provisions or development regulations would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant planning. See *Butler v. Lewis County,* WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing Invalidity, February 13, 2004). On the record before us, we do not find that a remand with an order to achieve compliance is insufficient to enable the County to pursue GMA-

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[12] Petitioner also requests a finding of invalidity based on the lack of variety of rural densities but it is unclear what portions of the resolution and ordinance could be found invalid to address this lack. *Ibid* at 31.

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compliant planning. However, if circumstances change such that development applications during the pendency of the County's compliance efforts are likely to vest in ways that will substantially interfere with the achievement of the goals and requirements of the GMA, we will entertain a motion to impose invalidity on provisions of Resolution 13234 and Ordinance 13235 that we have found noncompliant in this final decision and order. RCW 36.70A.330(4). Such a motion may be brought at any time until compliance has been found but must be accompanied by documents indicating the conditions justifying a finding of invalidity.

VII. FINDINGS OF FACT

1. Thurston County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.

2. Petitioner is a non-profit organization that participated in the adoption of Resolution 13234 and Ordinance 13235 in writing and orally. Petitioner raised the matters addressed in its Petition for Review to the County in its participation below.

3. Intervenor is a property owner whose property was added to the Tenino UGA in the County's adoption of Resolution 13234 and Ordinance 13235.

4. Resolution 13234 and Ordinance 13235 were adopted by the County on November 22, 2004 and notice of adoption was published on November 24, 2004.

5. Petitioner filed its petition for review of Resolution 13234 and Ordinance 13235 on January 21, 2005.

6. When the County adopted its comprehensive plan in 1995, it developed its own criteria for determining how to contain existing areas of more intensive development in the rural areas.

7. In 1997, the legislature adopted the provisions of RCW 36.70A.070(d) that set the requirements for "limited areas of more intensive rural development" (LAMIRDs).

8. The County's comprehensive plan designates high density rural residential areas which allow 4 dwelling units per acre (SR – 4/1) 2 dwelling units per acre (RR 2/1) 1 dwelling unit per acre (RR 1/1) and 1 dwelling unit per two acres (RR 1/2).

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9. Thurston County's zoning code contains development regulations setting residential density levels in excess of one dwelling unit per five acres in rural areas: Rural Residential – One Dwelling Unit per Two Acres (RR 1/2) (T.C.C. Ch. 20.10); Rural Residential – One Dwelling Unit per Acre (RR 1/1) (T.C.C. Ch. 20.11); Rural Residential – Two Dwelling Units per Acre (RR 2/1) (T.C.C. Chapter 20.13); and Suburban Residential – Four Dwelling Units per Acre (SR 4/1) (T.C.C. Chapter 20.14).

10. All of these residential density levels constitute "more intensive rural development" within the meaning of RCW 36.70A.070(5)(d).

11. 5.5 percent of rural lands in the county are designated for high intensity rural residential uses, i.e. SR – 4/1; RR 2/1; RR 1/1; and RR 1/2.

12. In its 2004 update of its comprehensive plan and development regulations, the County has not applied the statutory LAMIRD criteria to its existing areas of more intensive development in the rural areas.

13. County comprehensive plan Housing and Residential Densities Policies 1 and 2, and Rural Land Use and Activities Policy 8 exempt existing areas of high density rural residential development from the statutory requirements for LAMIRDs.

14. The Thurston County Comprehensive Plan Land Use Element contains a discussion of rural area designations. CP at 2-17 – 2-27. This discussion includes the criteria for inclusion in any of the rural area designations, including the higher density residential designations. CP at 2-24 – 2-27. None of the criteria include a review of the existence of development as of July 1, 1990, nor do they establish logical outer boundaries with reference to the statutory criteria. *Ibid.*

15. T.C.C. 20.09.040(1)(a) establishes a minimum lot size in the RR 1/5 zone as follows: "Conventional subdivision lot (net) – four acres for single family, eight acres for duplexes." This development regulation allows one single family dwelling unit per four acres, rather than one dwelling unit per five acres, in the RR 1/5 zone.

16. 48.3 percent of the County's rural residential areas fall into the RR 1/5 category. CP Table 2-1A at 2-18 – 2-19.

17. With such a large portion of the County's rural area designated as RR 1/5, the net density level of one dwelling unit per four acres in the RR 1/5 zone increases the conversion of undeveloped land into sprawling, low-density development in the rural area.

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18. T.C.C. Chapter 20.08A applies to lands in the long-term agricultural district; Ch. T.C.C. 20.08D applies to lands in the long-term forestry district; and T.C.C. Chapter 20.62 creates a program for transfer of development rights in long-term commercially significant agricultural lands. All of these designations are resource land designations.

19. Rural lands are lands "not designated for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5). Thus, the designations of agricultural and forest resource lands do not create a variety of *rural* densities.

20. Where the rural designations and zones themselves do not include a variety of densities, the comprehensive plan and development regulations must demonstrate how the "innovative techniques" create such varieties of densities in the rural area. The County's comprehensive plan does not describe how any innovative techniques have been used to provide a variety of rural densities in the rural area.

21. The County has chosen a 2025 total population forecast figure of 334,261. CP Table 2-1 at 2-12.

22. The OFM population forecast for the county forms the basis for the Buildable Lands Report determination of demand for urban lands in 2025.

23. The medium scenario regional forecast was found to fall within one percent of the new state medium range forecast (OFM's projection) and was therefore adopted for use in the Buildable Lands Report and, subsequently, the 2004 comprehensive plan update.

24. The County's buildable lands analysis concludes that the supply of residential land as of 2000 for urban Thurston County will exceed demand for urban residential land in 2025; it found a supply of 18,789 acres and a 2025 demand of 11, 582 acres. Buildable Lands Report for Thurston County, September 2002, Figure II-1 at II-4.

25. The 2004 update of the comprehensive plan accepts and utilizes the figures from the Buildable Lands Report for residential land supply and demand in urban areas. Thurston County Comprehensive Plan (CP), Facts Section and Land Use Chapter Table 2-1 at 2-11 – 2-12.

26. The County's allocation of residential urban lands (18,789 acres) exceeds its projected 2025 demand for such lands (11,582 acres) by 7,205 acres.

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27. Nowhere in the County's comprehensive plan is it indicated that a 38 percent market factor was utilized to increase the amount of acreage that is needed to accommodate projected urban residential growth.

28. The basis for the use of the urban residential land supply and demand figures is well grounded in the County's Buildable Lands Report.

29. The comprehensive plan does not include an explanation or justification for the use of a land supply market factor.

30. The Buildable Lands Report accounted for critical areas deductions in the net developable land available for urban residential development.

31. The County's comprehensive plan allocates a 2025 residential land demand of 30 acres and a corresponding land supply of 81 acres for the Bucoda UGA. CP Table 2-1.

32. The County's comprehensive plan allocates 353 acres for urban residential land demand in the Tenino UGA 2025 and projects a corresponding land supply of 505 acres. CP Table 2-1.

33. Urban Growth Area Policy 8(b) (CP at 2-50) provides for expansion of UGA boundaries when "There can be shown an overriding public benefit to public health, safety and welfare by moving the urban growth boundary."

34. Urban Growth Area Policy 8(b) and the expansion of the Tenino and Bucoda UGAs expand UGA boundaries beyond those lands needed to accommodate projected urban population growth.

35. Almost 15 percent of land in the County is used for local agriculture. CP Chapter Three – Natural Resources, pp. 3-3 – 3-7.

36. Petitioner's abbreviated argument simply does not demonstrate how the County's classification system fails to follow Agriculture Handbook No. 210.

37. Chapter 3 of the County comprehensive plan provides that "Designated agricultural lands should include only areas that are used for agriculture." Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4. This provision limits the designation (and thus conservation) of agricultural lands to those that are currently in use for agriculture.

38. County criteria number 5 for designation of agricultural resource lands requires that the predominant parcel size must be 20 acres or more. Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4.

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39. Using predominant parcel size of 20 acres as a designation criterion may exclude viable farms in which the total acreage farmed is in excess of 20 acres in size but each of the parcels making up the farm is less than 20 acres

VIII. CONCLUSIONS OF LAW

A. This Board has jurisdiction over the parties to this action.

B. This Board has jurisdiction over the subject-matter of this action.

C. Petitioner has standing to raise the issues in its Petition for Review.

D. The petition for review in this case was timely filed.

E. The County's high density rural residential designations (SR – 4/1; RR 2/1; RR 1/1; and RR 1/2); Housing and Residential Densities Policies 1 and 2, and Rural Land Use and Activities Policy 8; and the County's development regulations implementing these designations (T.C.C. Ch. 20.10; T.C.C. Ch. 20.11; T.C.C. Chapter 20.13; and T.C.C. Chapter 20.14) fail to comply with RCW 36.70A.070(5).

F. T.C.C. 20.09.040(1)(a) fails to comply with RCW 36.70A.070(5)(c) and (d) by effectively increasing the rural residential density in the RR 1/5 zone from one dwelling unit per five acres to one single-family dwelling unit per four acres.

G. The County's comprehensive plan and development regulations fail to provide for a variety of rural densities in the rural element as required by RCW 36.70A.070(5)(b).

H. The County's UGA designations and development regulations implementing them fail to comply with RCW 36.70A.110 by creating UGA boundaries that significantly exceed the projected demand for urban residential lands over the course of the 20-year planning horizon.

I. Urban Growth Area Policy 8(b) fails to comply with RCW 36.70A.110(1) and (2).

J. Petitioner has failed to meet its burden of proof as to the County's classification system for agricultural lands of long-term commercial significance and any inconsistencies alleged between the comprehensive plan provisions concerning it. Therefore, these provisions are compliant with the GMA.

K. Petitioner has failed to meet its burden of proof that the County's failure to consider farmlands of statewide importance violates the goals and requirements of the GMA.

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L. Agricultural land designation criteria numbers 3 and 5 (Thurston County Comprehensive Plan, Chapter Three – Natural Resource Lands, p. 3-4.) fail to comply with the requirements of the GMA to designate and conserve agricultural resource lands. RCW 36.70A.060 and 36.70A.170.

IX. ORDER

The County is ordered to achieve compliance with the Growth Management Act pursuant to this decision no later than January 18, 2006. The following schedule for compliance, briefing and hearing shall apply:

Compliance Due	January 17, 2006.
Compliance Report (County to file and serve on all parties)	January 24, 2006.
Any Objections to a Finding of Compliance Due	February 17, 2006.
County's Response Due	March 10, 2006
Compliance Hearing (location to be determined)	March 22, 2006

The Board incorporates the findings and conclusions of its Order Denying Motions To Dismiss, April 21, 2005, by reference in this final decision and order. As part of this final decision and order, the Order Denying Motions To Dismiss shall also become a final order upon entry of this decision.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),

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WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

Entered this 20th day of July 2005.

Margery Hite

Margery Hite, Board Member

Holly Gadbaw

Holly Gadbaw, Board Member

Gayle Rothrock

Gayle Rothrock, Board Member

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WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Case No. 05-2-0002

1000 Friends of Washington v. Thurston County and Intervenors William and Gail Barnett and Alpacas of America

DECLARATION OF SERVICE

I, PATRICIA DAVIS, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Executive Assistant to the Board for the Western Washington Growth Management Hearings Board. On the date indicated below a copy of a FINAL DECISION AND ORDER in the above-captioned case was sent to the following through the United State postal mail service:

Tim Trohimovich
1000 Friends of Washington
1617 Boylston Avenue, Suite 200
Seattle, Washington 98122

Alexander Mackie
Perkins Coie
111 Market Street NE Suite 200
Olympia, Washington 98501-1008

Allen T. Miller, Jr.
Deputy Prosecuting Attorney
Civil Division
2424 Evergreen Park Dr., SW, Ste. 102
Olympia, Washington 98502

The Honorable Kim Wyman
Thurston County Auditor
2000 Lakeridge Drive SW
Olympia, WA 98502

DATED this 20th day of July 2005.

Patricia Davis

PATRICIA DAVIS
EXECUTIVE ASSISTANT

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BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

1000 FRIENDS OF WASHINGTON

Petitioners,

v.

THURSTON COUNTY,

Respondent,

And,

WILLIAM AND GAIL BARNETT AND ALPACAS OF AMERICA,

Intervenors.

Case No. 05-2-0002

ORDER ON MOTION FOR RECONSIDERATION

THIS Matter comes before the Board upon the County's motion for reconsideration of the Board's Final Decision and Order dated July 20, 2005. Motion for Reconsideration and Brief in Support Thereof (August 1, 2005). Petitioner Futurewise (formerly 1000 Friends of Washington) filed its response on August 5, 2005. Petitioner Futurewise's Answer to Thurston County's Motion for Reconsideration. The County's motion is based on the grounds of errors of procedure or misinterpretation of fact or law material to the County pursuant to WAC 242-02-832(2)(a). *Ibid.*

The County raises five issues for reconsideration: standing; subject-matter jurisdiction, high density zones predating the GMA, rural densities, and sizing of UGAs (urban growth areas). We find no grounds for reconsideration as to standing, subject-matter jurisdiction, rural densities or sizing of UGAs. We grant reconsideration on TCC 20.09.040(1)(a) – Findings of Fact 15 and 17, and Conclusion of Law F.

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I. Standing

The County argues, again, that 1000 Friends of Washington does not have standing because it is a Seattle-based corporation with no ties to Thurston County. Motion for Reconsideration and Brief in Support Thereof at 2. The County argues that this means that 1000 Friends' interests are not within the zone of interests to be protected "by the challenged action." *Ibid.*

A "zone of interests" analysis does not apply to participatory standing under the Growth Management Act (GMA). The GMA establishes four types of standing. RCW 36.70A.280(2). Participatory standing allows petitions to be filed by those who "participated orally or in writing before the county or city regarding the matter on which a review is being requested" RCW 36.70A.280(2)(b). Another form of standing exists for persons "qualified pursuant to RCW 34.05.530." RCW 36.70A.280(2)(d). This type of standing incorporates the standing requirements under the Administrative Procedures Act (Ch. 34.05 RCW). While a zone of interests challenge might be applicable to APA standing (RCW 34.05.530(2)), it does not apply to standing based on participation under the GMA. Here, 1000 Friends participated orally and in writing regarding the matters challenged in this petition in the County's adoption of Resolution No. 13234 and Ordinance No. 13235. Finding of Fact 2. Petitioner therefore has standing to bring the challenges in its petition for review.

II. Subject-Matter Jurisdiction

The County again argues that the Board does not have subject-matter jurisdiction over the designation criteria of agricultural lands of long-term commercial significance because that part of the comprehensive plan was adopted in November 2003. Motion for Reconsideration and Brief in Support Thereof at 3.

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This argument confuses an appeal of the designation criteria adopted in November 2003 with an appeal of the County's failure to revise those criteria as needed to comply with the Growth Management Act in its 2004 update. RCW 36.70A.130(1). If Petitioner had appealed Resolution No. 13039 in its petition for review, then the appeal of that resolution had to be brought within sixty days of publication of adoption. RCW 36.70A.290(2)(a).[1] However, Petitioner did not appeal Resolution No. 13039; instead, Petitioner appealed Resolution No. 13234. Petition for Review (January 21, 2005). Resolution No. 13234 was the County's update of its comprehensive plan pursuant to RCW 36.70A.130. Resolution No. 13234 was adopted November 22, 2004, and notice of adoption was published on November 24, 2004. The January 21, 2005, appeal of Resolution No. 13234 was within the sixty-day period and therefore timely. Findings of Fact 4 and 5; Conclusion of Law D.

To the extent the County is arguing that Resolution No. 13039 was its update of its designation criteria for agricultural resource lands pursuant to RCW 36.70A.130, that resolution fails to contain the statutorily required finding that the adoption is a review and evaluation pursuant to RCW 36.70A.130:

> Legislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefore.

RCW 36.70A.130(1) (in pertinent part).

As Petitioner points out, "Thurston County Resolution No. 13039 contains no citation of RCW 36.70A.130(1)(a) or RCW 36.70A.130(4)(a). Thurston County Resolution No. 13039 contains no unambiguous statement that a review and evaluation has occurred. It also includes no reasons for not revising either the County's policies for designating agricultural lands of long-term commercial significance or the designations of agricultural lands of long-

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[1] Petitioner notes that no evidence of publication is in the record. Petitioner Futurewise's Answer to Thurston County's Motion for Reconsideration at 5-6.

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term commercial significance." Petitioner Futurewise's Answer to Thurston County's Motion for Reconsideration at 8. Such a finding is a necessary part of any legislative action to comply with the update requirements of RCW 36.70A.130. *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No. 04-2-0010 (Order on Motion to Dismiss, August 2, 2004). Without such a finding, the County cannot argue after the fact that Resolution 13039 was the update of its comprehensive plan provisions applicable to agricultural lands.

III. High Density Zones Predating the GMA

Although the County entitles this section "high density zones predating the GMA," the County actually only addresses the maximum density under the RR 1/5 zoning. Motion for Reconsideration and Brief in Support Thereof at 4. The County argues that the Board misreads TCC 20.09.040(1)(a) and that this provision does not allow overall densities of more than one dwelling unit per five acres. *Ibid* at 4. The County urges that the Board "should uphold this section of the development regulations as being compliant with rural zoning under the GMA." *Ibid.*

The County's argument on this section of its code relates to Findings of Fact 15 and 17 and Conclusion of Law F. Final Decision and Order (July 20, 2005):

Findings of Fact

15. T.C.C. 20.09.040(1)(a) establishes a minimum lot size in the RR 1/5 zone as follows: "Conventional subdivision lot (net) – four acres for single family, eight acres for duplexes." This development regulation allows one single family dwelling unit per four acres, rather than one dwelling unit per five acres, in the RR 1/5 zone.
16. ...
17. With such a large portion of the County's rural area designated as RR 1/5, the net density level of one dwelling unit per four acres in the RR 1/5 zone increases the conversion of undeveloped land into sprawling, low-density development in the rural area.

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Conclusions of Law

F. T.C.C. 20.09.040(1)(a) fails to comply with RCW 36.70A.070(5)(c) and (d) by effectively increasing the rural residential density in the RR 1/5 zone from one dwelling unit per five acres to one single-family dwelling unit per four acres.

The Board's decisions on this point were based upon the positions of the parties. In its opening brief, Petitioner argues that TCC 20.09.040(1)(a) "purports to have a density of one dwelling unit per five acres, [but] the actual net minimum lot size is four acres for single-family residences and eight acres for duplexes." Petitioners Futurewise's and League of Women Voters of Thurston County Prehearing Brief at 9. The County did not object to this characterization of TCC 20.09.040(1)(a) in its response brief. Respondent's Prehearing Brief at 8-12. For that reason, at the hearing on the merits, the Board asked counsel for the County if Petitioner's claim that TCC 20.09.040(1)(a) allowed one dwelling unit per four acre zoning was correct; and counsel replied that it was.

The County now asserts on reconsideration that the code only allows a maximum density of one dwelling unit per five acres in the RR 1/5 zone, but "allows for flexibility in lot sizing when creating a subdivision under TCC 20.09.040." Motion for Reconsideration and Brief in Support Thereof at 4. As an example, the County states that a four-acre lot can only be created in a RR 1/5 zone if it is part of a subdivision in which another lot compensates by being at least 6 acres in size. *Ibid.*

The Board finds this reading of T.C.C. 20.09.040(1)(a) persuasive. Petitioner also acknowledges that the County's reading may be the correct one. Petitioner Futurewise's Answer to Thurston County's Motion for Reconsideration at 9.

While it would have been helpful to have heard this argument earlier, it is better to correct the decision now than to fail to correct an error in it. Reconsideration will be granted and

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Findings of Fact 15 and 17 and Conclusion of Law F will be deleted from the Final Decision and Order.

IV. Rural Densities

The County argues first that its unique circumstances justify a uniform rural density of one dwelling unit per five acres, and second that the comprehensive plan does provide a variety of rural densities. Motion for Reconsideration and Brief in Support Thereof at 5. However, the comprehensive plan does not set forth unique circumstances for a uniform rural density of one dwelling unit per five acres, nor does it set out a variety of rural densities.

Second, the County continues to argue that low residential densities in resource lands provide a variety of *rural* densities. This misses an essential point of the GMA requirement for a variety of rural densities – to count as rural densities, the densities must be in rural lands. RCW 36.70A.070(5)(b).

The County provides no new information that causes the Board to reconsider its decision as to the plan's failure to provide a variety of rural densities.

V. Sizing UGAs

The County argues that the Board misapplied and misconstrued RCW 36.70A.110 in concluding that the County's UGAs are too large. Motion for Reconsideration and Brief in Support Thereof at 6.

The Board concluded that the urban lands included in UGAs significantly exceed the demand for such lands based upon the population allocated by the County to UGAs. See Findings of Fact 24 and 26 and Conclusion of Law H. The Board further found that there is no indication that a market factor was used to determine additional needed urban lands and no justification for using a market factor in the comprehensive plan. Findings of Fact 27

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and 29. On reconsideration, the County does not contest the Board's finding that the plan provides an excess supply of urban lands over projected demand in 2025. The County offers no place in the comprehensive plan where a market factor is justified or even applied. Therefore, the Board finds no grounds for reconsideration. We would note, however, that the Board did not enter a finding that the UGAs are too large; the Board's finding was that the supply of land significantly exceeds projected demand based upon the County's allocation of population growth to urban areas of the County. Finding of Fact 26. The determination of how to cure this non-compliance with the GMA rests with the County.

ORDER

Reconsideration of Findings of Fact 15 and 17 and Conclusion of Law F are hereby GRANTED. Reconsideration on other grounds is hereby DENIED. The Final Decision and Order dated July 20, 2005, is hereby AMENDED to delete Findings of Fact 15 and 17 and Conclusion of Law F. All other terms and conditions of the Final Decision and Order shall remain in full force and effect.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

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Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

Entered this 11th day of August 2005.

Margery Hite

Margery Hite, Board Member

Holly Gadbaw

Holly Gadbaw, Board Member

Gayle Rothrock

Gayle Rothrock, Board Member

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WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Case No. 05-2-0002

1000 Friends of Washington v. Thurston County and Intervenors William and Gail Barnett and Alpacas of America

DECLARATION OF SERVICE

I, PATRICIA DAVIS, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Executive Assistant to the Board for the Western Washington Growth Management Hearings Board. On the date indicated below a copy of an ORDER ON MOTION FOR RECONSIDERATION in the above-captioned case was sent to the following through the United State postal mail service:

Tim Trohimovich
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Allen T. Miller, Jr.
Deputy Prosecuting Attorney
Civil Division
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DATED this 11th day of August 2005.

Patricia Davis

PATRICIA DAVIS
EXECUTIVE ASSISTANT

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BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

1000 FRIENDS OF WASHINGTON

Petitioners,

v.

THURSTON COUNTY,

Respondent.

Case No. 05-2-0002

ORDER ON MOTIONS TO DISMISS

THIS Matter comes before the Board upon the County's Motion to Dismiss or Limit Issues. The County moves for dismissal of the Petition for Review on the grounds that the Petitioner lacks standing. The County further moves to dismiss issues 3 and 5 of the Prehearing Order on two grounds: Petitioner failed to join indispensable parties; and the appeal of the urban growth area (UGA) boundaries is time barred. We find that the Petitioner has standing to bring the claims in this Petition for Review; that the cities are not indispensable parties to the appeal of the County's decision regarding urban growth area boundaries; and that the appeal of the urban growth area boundaries is not time barred.

ISSUES ON MOTIONS TO DISMISS

A: Does Petitioner have standing to raise the issues in this petition for review?

B: Are the Cities of Olympia, Lacey, Tumwater and Yelm indispensable parties under CR 19 to the claims (Issues 3 and 5 of the Prehearing Order) regarding urban growth areas?

C: Is Petitioner barred from challenging the County's UGAs because those issues were litigated and decided in *Reading v. Thurston County,* WWGMHB Case No. 94-2-0019; and because the time for bringing such challenges was within sixty days of the UGA boundary adoptions in 1994 and 1995?

APPENDIX C-1

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BURDEN OF PROOF

This Petition for Review challenges the County's adoption of Resolution 13234 and Ordinance 13235. Resolution 13234 amends the County's comprehensive plan. Ordinance 13235 amends the County's development regulations. Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and amendments to them are presumed valid upon adoption. The statute further provides:

> The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

RCW 36.70A.320(3)

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993). The burden is on the Petitioner to demonstrate that any action taken by the County is not in compliance with the requirements of Ch. 36.70A RCW (the Growth Management Act, or, the GMA). RCW 36.70A.320(2).

DISCUSSION

A. Does Petitioner have standing to raise the issues in this petition for review?

The County first argues that the Petitioner does not have standing to challenge the resolution and ordinance at issue here because it "does not exist as a non-profit corporation as stated in the petition" and because Petitioner has neither shown that its interests are within the zone of interest to be protected by the challenged action nor alleged injury in fact in relation to the County's action in this matter. Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues at 4.

Petitioner responds that it is a registered non-profit corporation although it has officially changed its name from "1000 Friends of Washington" to "Futurewise." Response to Motion to Dismiss at 2. Petitioner further argues that it does not need to be a registered non-profit

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corporation - RCW 36.70A.280(3) defines a "person" who may have standing to include "a private organization or entity of any character." *Ibid* at 5.

RCW 36.70A.280(3) defines a "person":

> For purposes of this section "person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

While Petitioner submitted evidence that it is a registered non-profit corporation (Tab 1 to Petitioner's Response to Motion to Dismiss), it need not be a registered non-profit corporation to proceed under this section of the GMA. First as 1000 Friends of Washington and later under the new name of Futurewise, Petitioner clearly identified the issues it wished the County to address and made it plain that it was speaking as an organization rather than as an individual. Petitioner provided evidence that it submitted written comments, attended and testified at a Planning Commission meeting and at a public hearing before the Board of County Commissioners; and that in each instance the speaker and/or writer identified himself as speaking for Futurewise, rather than as an individual. *Ibid* at 6. This is sufficient to qualify the Petitioner as a "person" who may bring this Petition for Review.

In response to the allegation that it fails to allege interests within the zone of interests to be protected and to allege an injury in fact, Petitioner responds that it alleges "participation standing" rather than APA (Administrative Procedure Act) standing. *Ibid* at 4-6. Participation standing, Petitioner argues, requires that the person have participated in person or by submitting comments in writing in a public hearing or meeting. *Ibid.*

The GMA provides four bases upon which a person may have standing to bring a petition for review:

> A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is

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certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

RCW 36.70A.280(2)

The County challenges the Petitioner's standing on the basis of RCW 36.70A.280(2)(d) - standing pursuant to the Administrative Procedures Act (Ch. 34.05 RCW). However, Petitioner asserts standing under a different subsection of RCW 36.70A.280(2) – standing under RCW 36.70A.280(2)(b), which is participation standing. To establish participation standing, the person must have participated orally or in writing before the county or city regarding the matter on which review is requested. RCW 36.70A.280(2) and .280(4). This Futurewise did. See Index No. 130 (September 29, 2004, Letter to the Chair of the Thurston County Planning Commission); and Index No. 237 (November 15, 2004, Letter to the Board of Thurston County Commissioners).

Conclusion: We find the Petitioner has standing pursuant to RCW 36.70A.280(2)(b).

B. Are the Cities of Olympia, Lacey, Tumwater and Yelm indispensable parties under CR 19 to the claims (Issues 3 and 5 of the Prehearing Order) regarding urban growth areas?

The County moves to dismiss Issues 3 and 5 of the Prehearing Order, asserting that the Cities of Olympia, Lacey, Tumwater, and Yelm are indispensable parties under CR 19. Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues at 7. The County argues that the indispensable party rule applies to legislative actions such as those challenged here because the legislative decisions of Olympia, Lacey, Tumwater, and Yelm are at issue here. *Ibid.*

Petitioner responds that the cities do not have authority to adopt UGAs and so they are not indispensable parties to this action. Response to Motion to Dismiss at 13-14. Petitioner

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points to RCW 36.70A.110(6) which provides: "Each county shall include designations of urban growth areas in its comprehensive plan." *Ibid.*

Civil Rule 19 provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
> CR 19(a)

We note that the boards did not adopt this civil rule or any rule on joinder because the situation and authority of the growth boards is distinctly different from the general jurisdiction of the superior courts. The growth boards are limited in their powers and can only enter findings of compliance or noncompliance, invalidity, and a recommendation of sanctions based upon proper petitions brought pursuant to the GMA. See RCW 36.70A.280, .290, .300, .302, and .345. The boards have not been granted the power to join a local jurisdiction when there was no petition alleging that it failed to comply with the GMA. To impose a mandatory joinder requirement in addition to the petition filing deadlines would create a new restriction on petitions - one that is not present in the statute and one which creates a trap for the unwary. Therefore, Civil Rule 19 does not apply to actions before the boards. This does not mean that the cities might not wish to participate if they determine that they have interests to protect in this case. In that event, the cities can seek intervenor status pursuant to WAC 242-02-270. However, it does mean that the cities are not indispensable parties to this proceeding.

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Conclusion: The named cities are not indispensable parties to this action.

C. Is Petitioner barred from challenging the County's UGAs because those issues were litigated and decided in *Reading, v. Thurston County,* WWGMHB Case No. 94-2-0019; and because the time for bringing such challenges was within sixty days of the UGA boundary adoptions in 1994 and 1995?

The County argues that Petitioner cannot challenge the UGA decisions of nine to ten years ago because the statute requires petitions to be filed within sixty days of the publication of the adoption. Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues at 5. Petitioner responds that the County has not provided any evidence that it did publish notice of the adoption of the ordinance or resolution that created the UGAs. Response to Motion to Dismiss at 7. Petitioner also argues that it is challenging the resolution and ordinance adopted by the County on November 22, 2004, rather than any resolution or ordinance that may have been enacted nine or ten years ago. *Ibid* at 7-8.

Petitioner's claims arise out of the ordinance and resolution that the County enacted in November of 2004. The petition was timely filed with respect to those claims. The petition filing requirements apply to the legislative enactments, not to the "decisions."

The County further argues that the principles of *res judicata*, *collateral estoppel* and *stare decisis* preclude this Board from deciding Issues 3 and 5 because they were already litigated in the case of *Reading v. Thurston County,* WWGMHB 94-2-0019. Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues at 5. Petitioner points out that this argument can only apply to Issue 3 since it is the only issue that challenges the size and location of the County's UGA, which was subject to the challenge in the *Reading* case. Response to Motion to Dismiss at 7.

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The decision in *Reading v. Olympia,* WWGMHB Case No. 94-2-0019 (Final Decision and Order, March 23, 1995) considered challenges to the then-established UGAs. The Board found the Olympia UGA "too large" but also found that the Petitioners did not overcome the presumption of validity since the Lacey and Tumwater UGAs had not yet been designated. *Ibid.* The Board expressly reserved ruling on the UGA boundaries when all of them had been established:[1]

> The interior boundary lines between the three cities are minimally significant for GMA purposes. It is the exterior boundaries that are important. At the time of the hearing, Thurston County had not adopted a comprehensive plan UGA for either Lacey or Tumwater. Given that scenario, and the evidence in this record, we are not persuaded that the presumption of validity which attaches to the county's adoption of the Olympia UGA has been overcome by petitioners. We will review all the exterior boundaries if future challenges are made to the completed UGAs as established by Thurston County.

Reading v. Olympia, WWGMHB Case No. 94-2-0019 (Final Decision and Order, March 23, 1995).

The County argues that the issue of its Olympia UGA boundaries was litigated and decided in the County's favor. It is the prior decision, the County argues, that entitles the County to *res judicata* (claim preclusion), *collateral estoppel* (issue preclusion) and/or *stare decisis*. Memorandum in Support of Respondent's Dispositive Motion to Dismiss or Limit Issues at 6.

Petitioner responds that the elements of *res judicata* and/or *collateral estoppel* have not been met in this case. Response to Motion to Dismiss at 9 -13. For *res judicata* to apply, there must be an identity of subject-matter; cause of action; person or parties; and quality of the persons for or against whom the claim is made. *Alishio v. DSHS,* 122 Wn. App. 1, 9, 91 P.3d 893, 2004 Wash. App. LEXIS 655 (Div. I – 2004). There is no identity of parties here because 1000 Friends/Futurewise was not a party to the *Reading* case. Response to Motion to Dismiss at 11-12.

---

[1] No appeal of these later-established UGA boundaries was brought to this Board.

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For *collateral estoppel* to apply, the requirements are: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is applied. *Hadley v. Maxwell,* 144 Wn. 2d 306, 311-312, 27 P.3d 600, 2001 Wash. LEXIS 535 (2001). The focus is on whether there has been a full and fair hearing by all the parties. *Ibid.*

As Petitioner points out, it was not a party to the *Reading* case and was not in privity with those who were parties. Response to Motion to Dismiss at 11-12. Thus, the third requirement for *collateral estoppel* is not met in this case.

Petitioner also points out that it is appealing a different enactment (the County's 2004 update) than was appealed in the *Reading* case. Petitioner alleges that its appeal arises out of different facts, including a new set of population projections. *Ibid.* Therefore, Petitioner argues, the issues are not identical.

The Petition for Review in this case challenges the County's compliance with RCW 36.70A.130. Pursuant to RCW 36.70A.130(4)(a), Thurston County was required to "take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter" no later than December 1, 2004. This requirement is known as the "update" requirement. A central question in this appeal is what the County was required to do regarding the UGA boundaries as a result of its update requirements. This issue was clearly not litigated in the *Reading* case.

The County argues that *stare decisis* also bars the litigation of this Petition for Review but does not elaborate and provides no authority to support its assertion. There is, therefore, no basis provided for this argument.

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Conclusion: This petition is not barred by *stare decisis, collateral estoppel* and/or *res judicata.*

ORDER

Based on the foregoing, the County's Motions to Dismiss are hereby DENIED.

All of the issues as set out in the Prehearing Order will go forward for argument at the hearing on the merits on June 16, 2005.

Entered this 21st day of April 2005.

Margery Hite

Margery Hite, Board Member

Holly Gadbaw

Holly Gadbaw, Board Member

Gayle Rothrock

Gayle Rothrock, Board Member

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WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Case No. 05-2-0002

1000 Friends of Washington v. Thurston County

DECLARATION OF SERVICE

I, PATRICIA DAVIS, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Executive Assistant to the Board for the Western Washington Growth Management Hearings Board. On the date indicated below a copy of an ORDER ON MOTIONS TO DISMISS in the above-captioned case was sent to the following through the United State postal mail service:

John Zilavy
1000 Friends of Washington
1617 Boylston Avenue, Suite 200
Seattle, Washington 98122

Allen T. Miller, Jr.
Deputy Prosecuting Attorney
Civil Division
2424 Evergreen Park Dr., SW, Ste. 102
Olympia, Washington 98502

DATED this 21st day of April 2005.

Patricia Davis

PATRICIA DAVIS
EXECUTIVE ASSISTANT

APPENDIX C-10

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36.70A.130. Comprehensive plans—Review—Amendments

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.

(b) Except as otherwise provided, a county or city not planning under RCW 36.70A.040 shall take action to review and, if needed, revise its policies and development regulations regarding critical areas and natural resource lands adopted according to this chapter to ensure these policies and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section. Legislative action means the adoption of a resolution or ordinance following notice and a public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefor.

(c) The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section. The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.

(d) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

(2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section or in accordance with the provisions of subsection (8) of this section.

Amendments may be considered more frequently than once per year under the following circumstances:

(i) The initial adoption of a subarea plan that does not modify the comprehensive plan policies and designations applicable to the subarea;

(ii) The adoption or amendment of a shoreline master program under the procedures set forth in chapter 90.58 RCW;

(iii) The amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget; and

(iv) Until June 30, 2006, the designation of recreational lands under RCW 36.70A.1701. A county amending its comprehensive plan pursuant to this subsection (2)(a)(iv) may not do so more frequently than every eighteen months.

(b) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

(4) The department shall establish a schedule for counties and cities to take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter. Except as provided in subsection (8) of this section, the schedule established by the department shall provide for the reviews and evaluations to be completed as follows:

(a) On or before December 1, 2004, and every seven years thereafter, for Clallam, Clark, Jefferson, King, Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the cities within those counties;

(b) On or before December 1, 2005, and every seven years thereafter, for Cowlitz, Island, Lewis, Mason, San Juan, Skagit, and Skamania counties and the cities within those counties;

(c) On or before December 1, 2006, and every seven years thereafter, for Benton, Chelan, Douglas, Grant, Kittitas, Spokane, and Yakima counties and the cities within those counties; and

(d) On or before December 1, 2007, and every seven years thereafter, for Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grays Harbor, Klickitat,

Lincoln, Okanogan, Pacific, Pend Oreille, Stevens, Wahkiakum, Walla Walla, and Whitman counties and the cities within those counties.

(5)(a) Nothing in this section precludes a county or city from conducting the review and evaluation required by this section before the time limits established in subsection (4) of this section. Counties and cities may begin this process early and may be eligible for grants from the department, subject to available funding, if they elect to do so.

(b) State agencies are encouraged to provide technical assistance to the counties and cities in the review of critical area ordinances, comprehensive plans, and development regulations.

(6) A county or city subject to the time periods in subsection (4)(a) of this section that, pursuant to an ordinance adopted by the county or city establishing a schedule for periodic review of its comprehensive plan and development regulations, has conducted a review and evaluation of its comprehensive plan and development regulations and, on or after January 1, 2001, has taken action in response to that review and evaluation shall be deemed to have conducted the first review required by subsection (4)(a) of this section. Subsequent review and evaluation by the county or city of its comprehensive plan and development regulations shall be conducted in accordance with the time periods established under subsection (4)(a) of this section.

(7) The requirements imposed on counties and cities under this section shall be considered "requirements of this chapter" under the terms of RCW 36.70A.040(1). Only those counties and cities in compliance with the schedules in this section and those counties and cities demonstrating substantial progress towards compliance with the schedules in this section for development regulations that protect critical areas may receive grants, loans, pledges, or financial guarantees from those accounts established in RCW 43.155.050 and 70.146.030. A county or city that is fewer than twelve months out of compliance with the schedules in this section for development regulations that protect critical areas is deemed to be making substantial progress towards compliance. Only those counties and cities in compliance with the schedules in this section may receive preference for grants or loans subject to the provisions of RCW 43.17.250.

(8)(a) Counties and cities required to satisfy the requirements of this section according to the schedule established by subsection (4)(b) through (d) of this section may comply with the requirements of this section for development regulations that protect critical areas one year after the dates established in subsection (4)(b) through (d) of this section.

(b) Counties and cities complying with the requirements of this section one year after the dates established in subsection (4)(b) through (d) of this section for development regulations that protect critical areas shall be deemed in compliance with the requirements of this section.

(c) This subsection (8) applies only to the counties and cities specified in subsection (4)(b) through (d) of this section, and only to the requirements of this section for development regulations that protect critical areas that must be satisfied by December 1, 2005, December 1, 2006, and December 1, 2007.

(9) Notwithstanding subsection (8) of this section and the substantial progress provisions of subsections (7) and (10) of this section, only those counties and cities complying with the schedule in subsection (4) of this section may receive preferences for grants, loans, pledges, or financial guarantees from those accounts established in RCW 43.155.050 and 70.146.030.

(10) Until December 1, 2005, and notwithstanding subsection (7) of this section, a county or city subject to the time periods in subsection (4)(a) of this

section demonstrating substantial progress towards compliance with the schedules in this section for its comprehensive land use plan and development regulations may receive grants, loans, pledges, or financial guarantees from those accounts established in RCW 43.155.050 and 70.146.030. A county or city that is fewer than twelve months out of compliance with the schedules in this section for its comprehensive land use plan and development regulations is deemed to be making substantial progress towards compliance.

[2005 c 423 § 6, eff. May 12, 2005; 2005 c 294 § 2, eff. May 5, 2005; 2002 c 320 § 1; 1997 c 429 § 10; 1995 c 347 § 106; 1990 1st ex.s. c 17 § 13.]

Historical and Statutory Notes

Reviser's note: This section was amended by 2005 c 294 § 2 and by 2005 c 423 § 6, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Intent—Effective date—2005 c 423: See notes following RCW 36.70A.030.

Intent—2005 c 294: "The legislature recognizes the importance of appropriate and meaningful land use measures and that such measures are critical to preserving and fostering the quality of life enjoyed by Washingtonians. The legislature recognizes also that the growth management act requires counties and cities to review and, if needed, revise their comprehensive plans and development regulations on a cyclical basis. These requirements, which often require significant compliance efforts by local governments are, in part, an acknowledgment of the continual changes that occur within the state, and the need to ensure that land use measures reflect the collective wishes of its citizenry.

The legislature acknowledges that only those jurisdictions in compliance with the review and revision schedules of the growth management act are eligible to receive funds from the public works assistance and water quality accounts in the state treasury. The legislature further recognizes that some jurisdictions that are not yet in compliance with these review and revision schedules have demonstrated substantial progress towards compliance.

The legislature, therefore, intends to grant jurisdictions that are not in compliance with requirements for development regulations that protect critical areas, but are demonstrating substantial progress towards compliance with these requirements, twelve months of additional eligibility to receive grants, loans, pledges, or financial guarantees from the public works assistance and water quality accounts in the state treasury. The legislature intends to specify, however, that only counties and cities in compliance with the review and revision schedules of the growth management act may receive preference for financial assistance from these accounts." [2005 c 294 § 1.]

Effective date—2005 c 294: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 5, 2005]." [2005 c 294 § 3.]

2005 Legislation

Laws 2005, ch. 294, § 1 provides:

"The legislature recognizes the importance of appropriate and meaningful land use measures and that such measures are critical to preserving and fostering the quality of life enjoyed by Washingtonians. The legislature recognizes also that the growth management act requires counties and cities to review and, if needed, revise their comprehensive plans and development regulations on a cyclical basis. These requirements, which often require significant compliance efforts by local governments are, in part, an acknowledgment of the continual changes that occur within the state, and the need to ensure that land use measures reflect the collective wishes of its citizenry.

"The legislature acknowledges that only those jurisdictions in compliance with the review and revision schedules of the growth management act are eligible to receive funds from the public works assistance and water quality accounts in the state treasury. The legislature further recognizes that some jurisdictions that are not yet in compliance with these review and revision schedules have demonstrated substantial progress towards compliance.

"The legislature, therefore, intends to grant jurisdictions that are not in compliance with requirements for development regulations that protect critical areas, but

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

F. WHITMORE READING, HAROLD P. DYGERT, JOANNE MOORE-DYGERT, JOANN BLACK, J.R. GONZALEZ, MARY JO ROGERS-GONZALEZ, CHRISTINE M. MASTERSON, LYNN M. SALERNO, STEPHEN SCHRODER, STEPHEN LINDBERG and DIANA RYDER, individually, and as members of the SOUTH END NEIGHBORS DEFENSE FUND, a non-profit association, & THEODORE MAHR, RAYMOND A. and EMILY K. MAHR, GARY PERKINS, HENRY STOCKBRIDGE and MEMBERS OF SAVE ALLISON SPRINGS, Petitioners, vs. THURSTON COUNTY and CITY OF OLYMPIA, Respondents, and GARY E. BRIGGS, Intervenor.	No. 94-2-0019 FINAL ORDER

On September 23, 1994, attorney Theodore A. Mahr, acting on his own behalf and on behalf of Raymond A. and Emily K. Mahr, Gary Perkins, Henry Stockbridge and the members of Save Allison Springs, (*Mahr*), filed a petition for review challenging the comprehensive plan for Olympia and the Olympia urban growth area. The plan covered both the municipal corporate limits and the urban growth area of Olympia, was denominated a "joint" comprehensive plan and was adopted by both the City of Olympia and Thurston County. On September 29, 1994, F. Whitmore Reading and others, individually, and as members of the South End Neighbors Defense Fund, (*Reading*), filed a petition challenging the same comprehensive plan. Where both *Mahr* and *Reading* presented the same argument they will be referred to as petitioners.

On October 5, 1994, Gary E. Briggs filed a motion to intervene. Following the prehearing conference on November 10, 1994, an order was entered November 16, 1994, which directed consolidation of the petitions and granted intervenor status to Mr. Briggs. The November 16, 1994, order also fixed deadlines for various motions and established the issues. For ease of reference, and since the arguments were jointly presented, the city, county and intervenor shall be referred to as respondents.

After the November 10, 1994, hearing, all parties filed motions to supplement the original index to the

record. *Mahr* filed a motion to amend his petition. Respondents did not object to the proposed amendment. A hearing on November 30, 1994, resulted in an amended prehearing order, entered December 6, 1994. The amended prehearing order added two issues as a result of the *Mahr* amended petition and established the index to the record through item number 230, except for numbers 40, 43 and 226. The initial prehearing order was also changed to reflect the agreement of the parties that everyone had the documents from the index in their respective possession and that the submission of the actual documents that would become our record was to be done in conjunction with the submission of the brief of each party.

Appendix E-2

During the time these procedural matters were being completed, both Olympia and Thurston County filed motions to dismiss the petitions as being untimely under RCW 36.70A.290(2). By order dated November 23, 1994, we denied those motions. Respondents' request for a writ from Thurston County Superior Court to dismiss this case was denied by Judge Casey on the grounds that RCW 34.05 required judicial review by appeal of a final decision rather than by extraordinary writ.

On December 6, 1994, respondents filed dispositive motions on all issues. On December 22, 1994, we entered an order granting the motion as to one issue, striking one sub-issue that was conceded by petitioners and denying the motions as to all other issues in the case. The hearing on the merits began at 9:00 a.m. January 19, 1995, and concluded at 4:00 p.m. January 20, 1995.

Obtaining the record for our review was a nightmare. Hereinafter the problems and the reasons for them.

THE RECORD

On January 6, 1995, respondents filed a motion to "supplement the record" by inclusion of items number 231-247. A few days before the commencement of the hearing on the merits each petitioner also filed a request to "supplement the record". These motions were filed despite the November 23, 1994, deadline for filing such motions established in the prehearing order and a full hearing that was held on November 30, 1994, to resolve *all* questions about the record.

We allowed argument on the motions the morning of January 19, 1995. Exhibits 231-246 were admitted because the documents were not "supplemental evidence" but should have been included in the original index list filed prior to November 30, 1994. Exhibit 248, materials submitted by *Reading* and found in a city file only after a public records request was made, was also admitted. Again, these items were not "supplemental evidence" because they were part of the original "record developed by the city, [or] county", RCW 36.70A.290(4).

The other exhibits, which included affidavits from expert witnesses, as well as respondents' computer model (Ex. 247) which had not previously been published were "supplemental" evidence. None of the requests were timely, WAC 242-02-540, nor were the exhibits "necessary or of substantial assistance", RCW 36.70A.290(4). We, therefore, denied admission.

Meanwhile, on December 22, 1994, petitioners each submitted a brief on the merits. Neither submitted the part of the record that he intended to rely upon as was required by the December 6, 1994, amended prehearing order. Approximately one week later *Reading* submitted the exhibits used in his brief. *Mahr* complained that submission of exhibits was the respondents' responsibility. *Mahr's* position was rejected because of the agreement at the November 30, 1994, hearing that a party would be responsible

for submission of the exhibits from the index that each relied upon in his brief.

On January 6, 1995, respondents filed their brief with an original and three copies of the exhibits from the record upon which they intended to rely. That filing, with the necessary copies, included *20 filing boxes(!!)* of documents and two copies of 425 separate audio cassettes.

Given the high level of competence of counsel in all other facets of this case, we were astonished by the difficulty encountered in presenting the record. In light of that difficulty we take this opportunity to explain and clarify the items which are appropriate to be included in the record submitted for a board hearing.

RCW 36.70A.290(4) states:

> "The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision."

Under the provisions of this section a board renders its decision in a case based upon the evidence contained in the record developed by the local government during the time of adoption of the challenged action except in rare instances where supplemental evidence is allowed.

In order to determine what that "record developed" by the local government is, WAC 252-02-520(1) requires that the respondent local government prepare and submit an index within thirty days after the filing of a petition. This index, which should include *all* materials in files that were used in the development of the action being challenged, is an exhaustive *list* of the "record developed" by the local government. It is from this list that the exhibits to be submitted to a board are to be garnered. Under WAC 242-02-520(2) a preliminary list of the items from the index that will be used in the appeal is to be submitted by *each party* within 20 days after receiving the index. The admonition contained in this section concerns the necessity to actually review the list and be aware of both what is contained in the index list and also which of those items are important to the issues in the case. The admonition bears repeating:

> "...in complying with the requirements of this subsection, parties *shall not simply designate every document* but shall carefully review the index, and designate *only* those documents that are *reasonably necessary* for a full and fair determination of the issues presented." (emphasis supplied)

It is the intent of this subsection to ensure that only the items which are reasonably necessary for a board decision go through the expense of submission of an original and three copies. In order to assure that the record before a board stays within the parameters set forth by the Act and by our rules, a practice has developed with all three boards that the submission of exhibits be done at the time a party's brief is filed. This avoids the problem of over-designation at the fiftieth day from petition deadline and keeps

the size of the board record to the relevant and necessary items.

The purpose of WAC 242-02-520(2) is to minimize the time-consuming preparation of the record by a local government. In the instant case the five filing boxes (which with copies amounted to twenty filing boxes) submitted by respondents were reviewed by us prior to the January 19, 1995, hearing on the merits. During that review we found major problems with the exhibits.

First, about 70% of the exhibits submitted had no relevance to the issues presented in this case. Respondents did not even reference this unnecessary material in their brief. Secondly, it was abundantly clear that respondents had not reviewed the exhibits prior to submission. As an example, the volumes of planning commission minutes of every meeting for more than a year, not only included the one or two pages that potentially had relevance to the case, but also contained another forty to fifty pages of materials such as draft minutes of the last meeting, agendas for the planning commissions' retreat, etc. Another example involved a memorandum entitled "Are we planning for 20-years growth-or 40?". While the memorandum was relevant there were at least seven different copies in various exhibits.

This lack of review by respondents is simply unacceptable. It is a responsibility of all counsel, but particularly local government counsel, to ensure that the record transmitted from the local government to a board is only that which is reasonably necessary for a decision. An incredible amount of human and natural resources were wasted in this case by the failure to adequately review the material prior to submitting it to us. Two copies of 425 different audio cassettes, of which no more than five were even referred to by respondents, involved massive unnecessary staff time. The simple act of xeroxing five file boxes of documents (of which at least three boxes were totally unnecessary under any view of the record) involved substantial and unnecessary cost.

The purpose of legislation providing for an administrative appeal process is to provide a more efficient and more cost effective mechanism for resolving disputes than that of Superior Court. That laudable purpose has been thwarted by the manner in which the respondents submitted their portion of the record. Much of the expense to the City of Olympia and Thurston County for defending this case was unnecessary, and lies at the feet of counsel for the respondents.

Once we were finally able to determine which parts of this record had relevancy, we were able to address the issues which were presented in the amended prehearing order. Generally, those issues fell into three broad categories; (1) a challenge to the adequacy of the final Environmental Impact Statement (SEPA issues); (2) a challenge to the transportation element; and (3) a challenge to the Olympia urban growth area (UGA) boundary adopted in the comprehensive plan.

SEPA ISSUES

Appendix E-5

As we noted in *Mahr v. Thurston County,* WWGMHB #94-2-0007, State Environmental Policy Act (SEPA) issues do not involve the four-question analysis we established in *Clark County Natural Resources Council v. Clark County*, WWGMHB #92-2-0001. While we have previously addressed the scope of our review of determinations of nonsignificance (DNS) by means of the "clearly erroneous" test, this is the first case involving a challenge to an EIS. Thus, the logical first step is to establish standards for, and the scope of, our review of an EIS challenge. We note that respondents did not contest petitioners' standing to challenge the adequacy of the EIS, nor any alleged failure by petitioners to exhaust administrative remedies.

In determining the appropriate standard of review we look first to the GMA. RCW 36.70A.280(a) provides the jurisdictional underpinnings for review of a SEPA document relating to GMA plans, regulations or amendments.

RCW 36.70A.320, applies the presumption of validity to comprehensive plans, development regulations and amendments only. We conclude that an EIS does not carry a presumption of validity (adequacy) under the Act, although the burden of proof of showing inadequacy is with a petitioner.

RCW 43.21C.090 states in part:

> "In any action involving an attack on...the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight."

Pursuant to RCW 43.21C.110 the Department of Ecology has adopted "rules of interpretation and implementation" in WAC 197-11. Under RCW 43.21C.095 those rules are to be "accorded substantial deference" in dealing with SEPA.

Under WAC 197-11-738 a "detailed statement" is a final EIS. WAC 197-11-714 defines an "agency" as the local government body authorized to make law, hear contested cases or is a local agency. WAC 197-11-762 defines "local agency" for purposes of this case as the Olympia City Council. Thus, the "substantial weight" requirement of RCW 43.21C.090 applies to the local government decision-maker. Petitioners' contention that the RCW 43.21C.090 deference does not apply to local governments is contrary to the language of the WACs. The fact that the Olympia City Council did not formally rule on the adequacy of the EIS is not significant since the record shows that the EIS was used in reaching the final decision on the comprehensive plan.

The EIS was a nonproject, phased review document under WAC 197-11, and appropriately so. It is from this foundation that we reviewed appellate cases to determine a proper standard of review for our use. Cases which dealt with a DNS or with a project EIS were less persuasive. Rather, we found most compelling those cases which involved nonproject, phased development situations, such as *Ullock v. Bremerton* 17 Wn. App. 573 (1977) (*Ullock*), and *Citizens v. Klickitat County* 122 Wn.2d 619 (1993)

Appendix E-6

(*Citizens*). *Cathcart v. Snohomish County* 96 Wn.2d 201 (1981) (*Cathcart*) was also instructive as a nonproject, phased EIS case, with a recognition that Justice Stafford's concurring opinion probably presented a sounder basis for the decision.

Generally those cases set forth the parameters which apply to court review of an EIS. Those rules can be summarized as follows:

1. The scope of review is *de novo*;
2. The adequacy of an EIS is determined by the "rule of reason";
3. The governmental agency's determination that an EIS is adequate is entitled to "substantial weight".

We adopt these rules as our foundation for EIS review.

In the context of a SEPA challenge under the GMA we must initially decide the scope of "*de novo*" review of the nonproject EIS. RCW 36.70A.290(4) provides that our review is to be based upon the "record developed by the city, [or] county". It follows from the cases emanating from *Leschi Improvement Council v. State Highway Comm'n,* 84 Wn.2d 271 (1974), viewed in conjunction with the GMA, that our scope of *de novo* review is restricted to examination of the record properly before us.

Section .290(4) of the Act also provides that supplemental evidence is allowable if necessary, or if it would be of substantial assistance in reaching our decision. In the instant case there was no timely request made to supplement the record, as required by WAC 242-02-540. The only request to supplement the record on SEPA issues was filed immediately prior to the hearing on the merits. That request involved documents that were developed after the comprehensive plan was adopted, and an affidavit. Even had the request been timely, the proposed supplemental evidence would not have been of substantial assistance nor necessary in reaching our decision. We leave for a future case the issue of what supplemental evidence, if any, would be appropriate for *de novo* review.

Within the context of a *de novo* review, wherein the council's determination of adequacy is afforded "substantial weight", we review the adequacy challenge under the "rule of reason". Not every remote or speculative consequence need be included in the EIS, *Cheney v. Mountlake Terrace,* 87 Wn.2d 338 (1976). A nonproject plan "need only analyze environmental impacts at a highly generalized level of detail," *Citizens*. An EIS is adequate in a nonproject plan "where the environmental consequences are discussed in terms of a maximum potential development of the property" *Ullock.*

Having determined the general principles announced by SEPA, WAC 197-11, and the courts, we turn to the specific claims in this case.

Mahr pointed out that the comprehensive plan provided that some type of widening of Mud Bay road in

west Olympia was scheduled to occur in approximately three years and that new roads of some type were directed to be in place in the Ken Lake area during the 20-year life of the plan. None of these eventualities were mentioned in the EIS.

Reading pointed out that the 130-acre site upon which the Briggs Nursery has been located for many years was designated by the comprehensive plan to be the only urban village in the Olympia area. A sophisticated draft proposal involving more than 900 housing units and at least 200,000 square feet of commercial floor space was presented. Much of the Briggs Nursery site is on a class II aquifer. In the 83 years that the site has been a nursery, pesticide application and other potential damage has likely occurred. No discussion of these matters was included in the EIS.

Respondents countered that phased review for a nonproject action does not involve the level of detail asserted by petitioners. The EIS and the comprehensive plan both pointed out that, depending on the scope of the project, a more detailed project-specific EIS would be appropriate at the time implementation became a reality. We agree with respondents.

WAC 197-11-442 deals with the content of a nonproject EIS. It states that a lead agency shall have more flexibility in the preparation of a nonproject EIS because normally less detailed information is available.

While the lead agency is to discuss impacts and alternatives, it is only required to do so "in the level of detail appropriate to the scope of the nonproject proposal." A portion of the WAC states as follows:

> "(3) If the nonproject proposal concerns a specific geographic area, site specific analyses are not required, but may be included for areas of specific concern....
> (4) The EIS's discussion of alternatives for a comprehensive plan,...shall be limited to a general discussion of the impacts of alternate proposals for policies contained in such plans,...and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures...."

WAC 197-11-443(2) points out that a phased review of a nonproject action is to be based on an assessment of broad impacts. When a particular project is later proposed, the EIS must then focus on impacts and alternatives including mitigation measures, specific to the subsequent project and which have not been previously analyzed.

In *Richland v. Boundary Review Board*, 100 Wn.2d 864 (1984) the court dealt with a nonproject EIS for a regional shopping center zoning classification. The court pointed out that no specific shopping center had been proposed, and affirmed the adequacy of the EIS. Citing *Cheney* the court held that a nonproject EIS was not required to include a discussion of "possible" future development of a particular site.

As pointed out in *Ullock* at 581, a nonproject land use action has no immediate or measurable environmental consequence, but is in fact a legislative action designed to accomplish permissible changes. In *Cathcart* the court noted that the EIS under consideration for the 25-year project was "bare bones" and "devoid of any quantitative discussion as to cumulative and secondary effects on surrounding areas." Nonetheless the court approved the adequacy of the EIS and said at 210:

> "This project is an appropriate candidate for a piecemeal EIS presentation, for at this time it is extremely difficult to assess its full impact. Given the magnitude of the project, the length of time over which it will evolve, and the multiplicity of variables, staged EIS review appears to be an unavoidable necessity. At this point, an exhaustive EIS is impracticable in light of the difficulty of determining in the abstract, for a period of 25 years, such things as the rate at which the project will develop, the particular location of the housing units, the growth of the tax base which will support the needed public services, the evolution of transportation technologies, and the evolving socioeconomic interests of the prospective population."

Here the urban village concept at the Briggs Nursery site was no more than an idea. Development regulations to implement the comprehensive plan are even now being formulated. While a draft site plan was presented, it had no legal effect. The record showed that the timing of any environmental impacts from the Briggs site would have been speculative and based upon a variety of factors not the least of which is the transference of the nursery operation to Grays Harbor County over the next 20 years. While *Reading* complained that the traffic analysis that showed no significant impact on the

surrounding area was incorrect, he failed to sustain his burden of proof (see transportation element section). The 1988 Thurston County comprehensive plan designated the site as medium residential, 4-8 dwelling units per acre. There was not a significant change brought about by the redesignation to an urban village by the Joint Comprehensive Plan, such as might have been shown by a conversion of natural resource lands to residential.

Likewise, the potential roads in the Ken Lake area in west Olympia were so remote and speculative as to not even require mentioning in the EIS. While the Mud Bay road widening was scheduled to occur within three years, the specifics of when, where, number of lanes, pedestrian traffic, bicycle lanes, etc. were totally unknown. Any reference in the EIS to the potential widening project would have necessarily involved only speculative impacts.

Nor does WAC 365-195-760 direct a different result. While it is important to integrate SEPA analysis at the "front end" of the process, there is not yet a mandated requirement to do so under SEPA, a WAC, or GMA. Inclusion of some of the items claimed necessary by petitioners would have made this EIS better. The failure to include them, however, is not fatal.

Based on the record before us, the deference afforded under RCW 43.21C.090 and the lack of evidence to support petitioners' claims, we find the EIS adequate for this comprehensive plan.

Petitioners' remaining challenges to the transportation element of the Joint Comprehensive Plan and to the urban growth area are not directed toward the process used for adoption. Rather the complaints are to the substantive decisions of the Olympia City Council and Thurston County Board of County Commissioners. We therefore, analyze these non-SEPA challenges under our question 4 analysis:

> "4. DOES THE COMPREHENSIVE PLAN FALL WITHIN THE DISCRETION GRANTED TO THE DECISION-MAKER TO CHOOSE FROM A RANGE OF REASONABLE OPTIONS?"

TRANSPORTATION ELEMENT

Under GMA the Thurston Regional Planning Council (TRPC) was designated as the Regional Transportation Planning Organization, RCW 47.80.020. The TRPC consists of representatives from Thurston County, various cities and towns, Intercity Transit, Port of Olympia, school districts, and the state capitol committee. Pursuant to RCW 47.80.040, a Transportation Policy Board was appointed. In conjunction with the TRPC, the Policy Board prepared a regional transportation plan that was adopted in March 1993, RCW 47.80.030. This transportation plan served as the foundation for, and was adopted into the transportation element of the Joint Comprehensive Plan. Many of the goals and policies of the transportation plan were also integrated throughout the comprehensive plan.

The Regional Transportation Plan (RTP) set forth a series of goals and policies designed to create "an affordable and balanced transportation system that works effectively and that people will want to use." The overall objective of the plan is stated as follows:

> "The following goals, policies and strategies will contribute to *reducing the percent of people who drive alone.* This would be *measured* by reducing work trip drive alones to 60% in 20 years." (Emphasis supplied)

Appendix E-11

Those goals, policies and strategies included increasing densities in the urbanized area, high and medium density traffic corridors, a connected-streets policy, incentives for alternate modes of transportation including pedestrian-friendly access, and disincentives for single occupancy vehicles. The rate of drive-alone work trips for Thurston County in 1992 was 85% of the total work trips. The goal was to reduce drive-alones. The measuring device to determine if that goal was achieved is the drive alone work trip reduction to 60% in 20 years. The plan only directed this reduction to work trip commuting, not non-work related driving. The RTP also hedged somewhat by directing that the right-of-way acquisition projections were to be based upon a goal reduction of single occupancy vehicle work trips from 85% of the total work trips to 70%.

Petitioners challenged this "60% goal" as being unrealistic and unachievable. Their argument was that because of this unrealistic basic assumption in the RTP, the transportation element and the capital facilities element of the Joint Comprehensive Plan were doomed to failure.

Petitioners' argument fails on a number of grounds. Initially there is little or nothing in the record before us to support their claim that the reduction goal is unrealistic or unachievable. The only evidence presented in support of the claim was an affidavit from a traffic analyst submitted at the dispositive motion hearing. The affidavit was reintroduced at the hearing on the merits. We declined to admit the affidavit on both occasions. Rarely will we consider supplemental evidence that could have been, but was not, submitted to the local government decision-maker. A claim that petitioners here did not have the opportunity to gather, pay for and present this evidence to the local government decision-maker is unavailing. This is particularly so when the record reveals the process for the RTP and the Joint Comprehensive Plan involved some four years during which time many of the individual petitioners participated.

In reviewing the RTP and the Joint Comprehensive Plan, we note that the "goal" is to reduce "the percentage of people who drive alone." As stated in the RTP this goal is to be measured by the achievement of a reduction in *work* trip drive-alones to 60%. Even assuming the 60% reduction is a "goal", a goal is not a guarantee.

A comprehensive plan is not a static document. As things change, and they always do, the GMA envisions that updates and changes to conform with new information obtained over the life of the plan will be made. Petitioners have failed to overcome the presumption of validity that attaches to the Joint Comprehensive Plan. Even had we admitted the traffic analyst's affidavit, this result would not have changed.

In 1992 the City of Olympia adopted a "connected-streets policy" for future development. The policy directed that future subdivisions in the City were to be designed so that streets would not dead-end within the subdivision but rather connect-up to other streets. Cul-de-sacs and dead-ends were to be

discouraged. The purpose of the connected-streets policy was to provide better traffic flow, encourage alternative methods of travel and discourage auto-dependency. Petitioners claim that the Joint Comprehensive Plan, which adopted this connected-streets policy, failed to take into consideration RCW 36.70A.020(6) which states a goal of the Act to be that private property shall not be taken for public use without just compensation.

The connected-streets policy does not require that private property be taken so that existing streets would be connected, but only that future development incorporate the policy as a design feature. Petitioners' claim that the Joint Comprehensive Plan did not consider the financial impact of this alleged "taking" is without merit and not supported by evidence contained in this record.

Similarly the complaint that Level of Service (LOS) standards were not contained in the comprehensive plan as required by RCW 36.70A.070(6)(ii), is contrary to the record. The Regional Transportation Plan provided regional coordination and was adopted in the Joint Comprehensive Plan at chapter 6 page 3. The RTP discussed applicable LOS levels at high density and medium density corridors, transit services, etc. The Joint Comprehensive Plan transportation element identified intersection LOS's and the Capital Facilities Plan indicated the planned facilities necessary to accomplish the designated LOS.

Reading also contended that the Joint Comprehensive Plan failed to establish the requisite concurrency aspects for the proposed Briggs Nursery Urban Village. If *Reading's* argument was that RCW 36.70A.020(12), the concurrency goal, was not achieved in the Joint Comprehensive Plan the argument is contrary to the evidence revealed by this record. The Joint Comprehensive Plan provided an excellent presentation of ensuring that public facilities and services would be adequate to serve development "at the time the development is available for occupancy" without decreasing the LOS standards.

The concurrency goal of the Act is specifically directed to the transportation element by RCW 36.70A.070(e), which provides that *after* adoption of the comprehensive plan, development regulations must be adopted that prohibit the approval of a development which would cause a transportation facility LOS to decline below those designated in the comprehensive plan. Obviously, petitioners cannot claim at this point that this section of the Act has been violated since there are neither development regulations as yet, nor a development application for the Briggs Nursery site to be acted upon.

Finally, petitioners contended that the 10-year traffic forecast required by RCW 36.70A.070(6)(iv) was not included in the Joint Comprehensive Plan. Petitioners are correct in this assertion.

Respondents acknowledged that the forecast is neither in the Joint Comprehensive Plan nor the Regional Transportation Plan. Respondents have shown that the work was in fact done by means of a computer model (Ex. 247) and "was available to anyone who wanted to use it." The "availability" of this computer model does not comply with the Act.

Appendix E-13

RCW 36.70A.070(6) directs that the various transportation sub-elements "shall" be included in the plan. The point of requiring inclusion of these sub-elements is two-fold. First, the Legislature obviously wanted to ensure that the analyses and evidence were prepared. Secondly, and as importantly, the Legislature intended that those analyses be made readily available to both the local decision-maker and members of the public. This mandatory sub-element was not complied with by having a computer model available but not set forth in the plan as required.

Respondents proffered the computer model as an exhibit in this record (Ex. 247). Just as we are not disposed to allow petitioners to bring forth evidence not available to the local decision-makers, we are similarly not disposed to allow respondents to do the same thing.

URBAN GROWTH AREA

Petitioners challenged the adoption of the Olympia urban growth area. A number of challenges were made and superficially appeared to be directed to the City of Olympia's part of the Joint Comprehensive Plan. Nonetheless, it is clear under RCW 36.70A.110(1) that a county has the ultimate responsibility of determining population figures and urban growth boundaries. Obviously, any city involved in the location of the boundary would have a great deal of influence in the final decision by the county. Nevertheless, any challenge to the urban growth area must necessarily be leveled against the particular county involved.

The precise boundaries and population figures for the north county area were developed by the cities of Lacey, Olympia and Tumwater in conjunction with Thurston County by means of a 1988 interlocal agreement and participation in the Thurston Regional Planning Council. The Thurston County Board of Commissioners' adoption of the Joint
Comprehensive Plan ratified the boundaries and population projections established by the TRPC.

Petitioners complained that the population projections were fundamentally flawed because the TRPC used a computer model called EMPFOR rather than the Office of Financial Management (OFM) projections. Additionally, the Joint Comprehensive Plan established a population projection for the year 2015 from the EMPFOR model rather than the year 2012 from the OFM projection. We do not find the use of these figures, nor the establishment of 2015 as the appropriate planning period, as being out of compliance.

RCW 36.78.110(2) provides, in part, that urban growth areas established in a comprehensive plan are to provide for the "urban growth that is projected to occur in the county for the succeeding 20 year period." In our jurisdiction, there are counties that are just now beginning the GMA process. It would seem disingenuous to require them to stop their planning at the year 2012 simply on the basis that OFM does

not have a more current population projection.

We hold that the use of the EMPFOR model under the evidence in this case, was within the discretion of the Board of County Commissioners. The EMPFOR model allowed a 20-year planning horizon to take place as well as provided for more current information such as the anticipated (although yet unrealized) influx of additional troops to Fort Lewis. The EMPFOR model was shown to be extremely accurate in comparison to historical population figures. The difference in future population projections between EMPFOR and the OFM model was slight. Under all the information contained in this record as to the population projections as they relate to the Olympia area, we find that Thurston County is in compliance with the Act.

Petitioners also contended that no matter which population projection was used, the urban growth area boundary was not based upon an adequate land capacity analysis, and was too large. After reviewing this record we are mystified by petitioners' claim that no land capacity analysis took place. The plan itself and the foundational material upon which it was based are replete with charts, maps, and information, showing the amount of land in the Olympia municipal limits and UGA, as well as existing and projected housing units, commercial areas, and industrial areas. This record contains an excellent land capacity analysis upon which local decision-makers could rely.

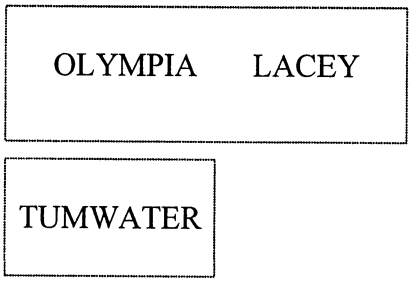
All of those kudoi given, nonetheless we agree with petitioners that the area designated as the Olympia urban growth boundary is too large.

Respondents argued that pre-existing sewer, water and planning decisions made it impossible, or at least impractical, to designate a smaller UGA. We reiterate our previous statements that the GMA does not allow what now appear to be unfortunate historical planning decisions to be the basis for future planning decisions. It is time to leave that past behind.

Two reasons salvage this overly large UGA from being out of compliance with the Act. First is the exceptionally well-developed series of goals and policies of the Comprehensive Plan and the Regional Transportation Plan. The anti-sprawl, in-filling, minimum densities and compact development features of both plans, assuming proper development regulations are later adopted, complies with the omnipresent anti-sprawl foundation of the Act.

The second feature which mitigates against non-compliance is the unique configuration of the cities of Olympia, Lacey and Tumwater. Conceptually, the area of these virtually abutting cities can be described as a square or a rectangle with a part of the southeast quadrant eliminated. Visually, the overall area looks something like this:

Appendix E-15



The interior boundary lines between the three cities are minimally significant for GMA purposes. It is the exterior boundaries that are important. At the time of the hearing, Thurston County had not adopted a comprehensive plan UGA for either Lacey or Tumwater. Given that scenario, and the evidence in this record, we are not persuaded that the presumption of validity which attaches to the county's adoption of the Olympia UGA has been overcome by petitioners. We will review all the exterior boundaries if future challenges are made to the completed UGAs as established by Thurston County.

The foundational characteristic of the Act is the avoidance of inefficiencies found in a sprawling development pattern. Were it not for the excellent anti-sprawl goals, policies and strategies of the Joint Comprehensive Plan *and* the unique configuration of the three cities, this UGA would not have been in compliance with the Act.

Petitioners' remaining claim that RCW 36.70A.020(10), the environment goal, was violated has no support in this record.

We find that the Joint Comprehensive Plan does comply with the Act, except for the failure to include the forecast required by RCW 36.70A.070(6)(iv).

In order to fully comply with the Act, that deficiency must be corrected with 120 days of this date.

This is a Final Order under RCW 36.70A.300 for purposes of appeal.

DATED this_____day of March, 1995.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

William H. Nielsen
Board Member

_____

Les Eldridge

Appendix E-16

Board Member

Nan A. Henriksen
Board Member